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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 528

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., PETITIONERS,

vs.

NATIONAL BITUMINOUS COAL COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 16, 1938.

CERTIORARI GRANTED DECEMBER 19, 1938.



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United States Court of Appeals for the District of Columbia

A. District Court of the United States for the District of Columbia

In Equity No. 68049

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., *Plaintiffs*,

vs.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, THOMAS S. HAYMOND, INDIVIDUALLY, &C., ET AL., *Defendants*.

BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 Filed September 7, 1938

In the District Court of the United States for the District of Columbia.

IN EQUITY NO. 68049

UTAH FUEL COMPANY,
Judge Building, Salt Lake City, Utah.
INDEPENDENT COAL AND COKE COMPANY,
Walker Bank Building, Salt Lake City, Utah.
LIBERTY FUEL COMPANY,
Kearns Building, Salt Lake City, Utah.
ROYAL COAL COMPANY,
Newhouse Building, Salt Lake City, Utah.
SPRING CANYON COAL COMPANY,
Newhouse Building, Salt Lake City, Utah.
UNITED STATES FUEL COMPANY,
Newhouse Building, Salt Lake City, Utah
CHESTERFIELD COAL COMPANY,
Atlas Building, Salt Lake City, Utah.
HI-HEAT COAL COMPANY,
22 West Second Street, South, Salt Lake City, Utah.
SHERIDAN-WYOMING COAL COMPANY,
Monarch, Wyoming.
HOTCHKISS COAL COMPANY,
Monarch, Wyoming.
MALLORY COAL COMPANY,
Pritchard Building, Huntington, W. Va.
CARBON FUEL COMPANY,
Kanawha Valley Building, Charleston, W. Va.
DIXPORT COAL COMPANY,
Kanawha Valley Building, Charleston, W. Va.
THE HANNA COAL COMPANY OF OHIO,
Leader Building, Cleveland, Ohio.
PITTSBURGH COAL COMPANY,
Henry W. Oliver Building, Pittsburgh, Pa.
JAMISON COAL AND COKE COMPANY,
Jamison Building, Greensburg, Pa.
ATLANTIC SMOKELESS COAL COMPANY,
Asko, West Virginia.
WHEELING COAL COMPANY,
River Road, Wheeling, W. Va.
WESTMORELAND COAL COMPANY,
2500 Fidelity Trust Building, Philadelphia, Pa.
ROCHESTER AND PITTSBURGH COAL COMPANY,
655 Church Street, Indiana, Pa.
ASHLAND COAL & COKE COMPANY,
Bluefield, W. Va.
HILLMAN COAL & COKE COMPANY,
Grant Building, Pittburgh, Pa.
Plaintiffs,

v.

NATIONAL BITUMINOUS COAL COMMISSION, and
PERCY TETLOW,
ELRAS E. GREENLEE,
THOMAS S. HAYMOND,
JOHN C. LEWIS,
WALTER H. MALONEY,
CLARENCE E. SMITH,
Individually and as Members of the
National Bituminous Coal Commission, and
P. W. McCULLOUGH,
Individually and as Secretary of the
National Bituminous Coal Commission,
Defendants.

BILL OF COMPLAINT FOR INJUNCTION AND PETITION FOR DECLARATORY JUDGMENT.

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2 To the District Court of the United States
For the District of Columbia:

Plaintiffs bring this, their bill of complaint against the defendants herein named and respectfully complain and show to the Court as follows:

1. Plaintiff, Utah Fuel Company, is a corporation of the State of New York; plaintiffs, Independent Coal and Coke Company, Spring Canyon Coal Company, and Liberty Fuel Company, are corporations of the State of Utah; plaintiffs, United States Fuel Company and Hi-Heat Coal Company are corporations of the State of Nevada; and plaintiffs Royal Coal Company and Chesterfield Coal Company are corporations of the State of Delaware. Each of the plaintiffs described in this paragraph has its principal office and place of business in Salt Lake City, Utah, and each owns and operates mines located in the state of Utah from which is produced, sold and shipped bituminous coal to points in Utah and to points in various other states, in competition with bituminous coal mined and produced by other coal operators in the states of Utah, Wyoming, Colorado, Montana, Washington and other states. These plaintiffs, which will hereinafter sometimes be called the Utah plaintiffs, have coal mines and property in District No. 20, and in Minimum Price Area No. 7, as defined in the Bituminous Coal Act of 1937.

Plaintiffs, Sheridan-Wyoming Coal Company, Inc., and the Hotchkiss Coal Company, are corporations of the State of Wyoming, each of which owns and operates mines in the state of Wyoming from which is produced, sold and shipped

bituminous coal to points in Wyoming and to points in various other states in competition with bituminous coal mined and produced by other coal operators in the states of Wyoming, Utah, Colorado and other states. These plaintiffs, who will hereinafter sometimes be called
3 the Wyoming plaintiffs, have coal mines and property in District No. 19, and in Minimum Price Area No. 7, as defined in the Bituminous Coal Act of 1937.

Plaintiffs, Mallory Coal Company, Carbon Fuel Company, Dixport Coal Company, Atlantic Smokeless Coal Company, Wheeling Coal Company and Ashland Coal and Coke Company, are corporations of the State of West Virginia, which own and operate coal mines in the state of West Virginia located in Districts Nos. 6, 7, and 8, and in Minimum Price Area No. 1, as defined in the Bituminous Coal Act of 1937, and each of which is engaged in the production, sale and shipment of bituminous coal to points in West Virginia and to points in various other states. Plaintiffs, Pittsburgh Coal Company, Jamison Coal and Coke Company, Westmoreland Coal Company, Hillman Coal and Coke Company, and Rochester & Pittsburgh Coal Company are corporations of the State of Pennsylvania which own and operate coal mines in the state of Pennsylvania located in Districts Nos. 1 and 2, and Minimum Price Area No. 1, as defined in the Bituminous Coal Act of 1937. Plaintiff, The Hanna Coal Company of Ohio, is a corporation of Ohio, which owns and operates coal mines in the state of Ohio located in District No. 4 and Minimum Price Area No. 1, as defined in the Bituminous Coal Act of 1937. Each of the plaintiff corporations, which may hereinafter sometimes be called collectively the eastern plaintiffs, is engaged in the production, sale and shipment of bituminous coal in interstate and in intrastate commerce, from the mines and districts described in competition with bituminous coal mined by other coal producers in West Virginia, Pennsylvania, Kentucky, Ohio and other states.

2. Plaintiffs and each of them have duly and regularly accepted the Bituminous Coal Code, promulgated by the defendant, the National Bituminous Coal Commission, under the provisions of the Bituminous Coal Act of
4 1937, and are members of that code in good standing.

3. Plaintiffs bring this complaint against the defendants, National Bituminous Coal Commission, herein-

after sometimes called the Commission, and Percy Tetlow, Pleas E. Greenlee, Thomas S. Haymond, John C. Lewis, Walter H. Maloney, and Clarence E. Smith, as individuals and as members of that Commission, and against F. W. McCullough, as an individual and as secretary of that Commission. By the terms of the Bituminous Coal Act of 1937, the defendant Commission is established with its principal office in the city of Washington, D. C., for the purpose of carrying out the provisions of that act. Each of the individual defendants is a citizen of the United States and has his official residence and is to be found in the District of Columbia. The Commission is authorized to have a seal which shall be judicially recognized.

4. This is a suit in equity, of a civil nature, arising under the laws of the United States, and it presents and involves an actual controversy between plaintiffs and defendants, and the matter in controversy as to each plaintiff, exclusive of interest and costs, exceeds the sum of $3,000, and relates to an Act of Congress regulating interstate commerce, to wit: The Bituminous Coal Act of 1937. (15 U. S. C. 828-851).

5. Plaintiffs bring this suit to prevent irreparable injury and damage to them and to their business and property used by them in the production and sale of bituminous coal in interstate and intrastate commerce, and to prevent, and restrain the defendants and each of them and their agents and persons acting for them, from the threatened disclosure by the defendants of the cost data and realization prices which the plaintiffs and each of them have heretofore
5 filed with the Commission under the provisions of the Bituminous Coal Act of 1937, which provisions, as will hereinafter be shown, impose on the defendants the duty to treat in confidence and keep secure such cost data and realization prices as the private property of plaintiffs.

6. On March 30, 1938 the Commission made and promulgated a ruling in which it announced that it would thereafter give public notice of a hearing to be held to determine the weighted average of the total costs of the tonnage of coal from each minimum price area in the calendar year 1936, adjusted as provided by section 4(a), Part II of the Bituminous Coal Act of 1937, at which hearing the information obtained from individual coal producers with respect to individual costs of production of the coals of such

producers in the calendar year 1936, would be made available for introduction in evidence at such hearings to support the determination of the district boards of the total cost of the ascertainable tonnage produced in their respective districts in the calendar year 1936, and also to support the Commission's determination of the weighted average of the total cost of the tonnage for each minimum price area in that year, adjusted as prescribed in the Act. In such ruling the Commission further announced it construed section 10 (a) of the Bituminous Coal Act of 1937 as authorizing such a disclosure in such circumstances.

Thereafter certain of the plaintiffs herein filed a petition with the Commission which objected to the ruling of March 30, 1938 as erroneous and which prayed, *inter alia*, for a hearing and that upon consideration of the facts and circumstances recited in the petition and the provisions of the Bituminous Coal Act of 1937, the Commission vacate that ruling and rescind its construction of section 10 (a) of said act. The Commission thereupon assigned
6 that petition for hearing. Such a hearing was held at the office of the Commission in Washington, D. C., on May 25 and 26, 1938. The plaintiff, Mallory Coal Company, and certain other coal producers, participated in that hearing. As the result thereof, on June 1, 1938 the Commission filed its report, findings of fact and opinion, and made and entered an order as of that date. In that order the Commission adhered to its ruling of March 30, 1938, recited the substance of the petitions and the evidence of injury, whereupon it denied said petitions and ordered and directed:

"That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

The plaintiff, Mallory Coal Company, and certain other coal producers, being dissatisfied and aggrieved by the order of the Commission of June 1, 1938, filed a petition in the United States Court of Appeals for the District of Columbia on June 6, 1938, pursuant to the provisions of sec-

tion 6 (b) of Part II of the Bituminous Coal Act of 1937. That petition was heard and considered by that Court and on August 1, 1938 in No. 7178, *Mallory Coal Co., et al.* v. *National Bituminous Coal Commission*, the Court dismissed the petition on the ground that the order entered by the Commission was not a reviewable order under the provisions of section 6 (b) of Part II of the Bituminous Coal Act.

7. On May 25, 1938 the Commission promulgated a notice and order for hearing in the redetermination of weighted average of the total cost of tonnage produced within minimum price areas Nos. 6, 7, 9 and 10. This proceeding known as General Docket No. 15, was assigned for hearing at the Shirley-Savoy Hotel, in Denver,
7 Col., on June 9, 1938. The order of the Commission of May 25, 1938 served notice that there would be made available for inspection by those interested persons who filed appearances at the hearing as therein provided, inter alia; "the verified cost reports of the individual producers within each of said districts upon which the cost data submitted to the District Boards by the Statistical Bureaus of the Commission are based, and upon which are based the said exhibits prepared by the Bureau of Research and Statistics of the Commission."

On or about May 31, 1938 the Utah plaintiffs and others filed a petition with the Commission requesting that it modify and set aside its ruling of March 30, 1938 and its order of May 25, 1938, hereinbefore described. Thereafter, to wit, on August 5, 1938 the Commission entered an order which denied that petition.

8. On August 31, 1938 the Commission made and entered an order in its General Docket No. 15 as to Minimum Price Areas Nos. 6, 7, 9 and 10, which provides:

"1. That the Secretary of the Commission be and he is hereby directed to cause the verified cost reports of the individual producers within each of Minimum Price Areas 6, 7, 9 and 10, submitted to the Commission pursuant to Orders Nos. 15 and 29, to be made available for inspection during business hours on and after September 10th, 1938, at the offices of the Commission, Central Savings Bank Building, Denver, Colorado, by those interested parties who have filed appearances in this proceeding. Notices of

appearance may be filed with the Commission at the Secretary's Office, Washington, D. C., or at the Offices of the Commission, Central Savings Bank Building, Denver, Colorado.

2. The hearing in the matter of the determination of the weighted average of the total costs per net ton of the tonnage produced in Minimum Price Areas 6, 7, 9 and 10, is hereby reopened and notice is hereby given that the Commission will, on the 20th day of September, 1938, at 10:00 A. M. in its hearing room in the Albany Hotel, Denver, Colorado, afford all interested parties further opportunity to introduce affirmative evidence and to cross-examine witnesses as to the correctness of said composite reports heretofore introduced in evidence in this proceeding."

8 On the same day and in the same proceeding, the Commission also made and entered an order as to Minimum Price Areas Nos. 1, 2, 3, 4, and 5, which provides:

"1. That the Secretary of the Commission be and he is hereby directed to cause the varified cost reports of the individual producers within each of Minimum Price Areas 1, 2, 3, 4 and 5 submitted to the Commission pursuant to Orders Nos. 15 and 29, to be made available for inspection during business hours on and after September 15, 1938, at the offices of the Commission, Washington, D. C., by those interested parties who have filed appearances in this proceeding. Notices of appearance may be filed with the Commission at the Secretary's office, Washington, D. C."

9. Unless defendants are restrained and enjoined, as herein prayed, the individual verified cost reports of the Utah and Wyoming plaintiffs herein whose coal mines are located in Minimum Price Area No. 7 will be made available for inspection by interested parties at the office of the Commission in the Central Savings Bank Building, Denver, Colorado, on and after September 10, 1938, and such data may thereafter be introduced by such interested parties at the hearing in the proceeding which, by the order, is assigned at the Albany Hotel in Denver, September 20, 1938; and, the individual cost reports of the eastern plaintiffs herein whose coal mines are located in Minimum Price Areas No. 1 will be made available for inspection by interested parties at the offices of the Commission in Wash-

ington, D. C., on and after September 15, 1938. The disclosure of the individual cost reports and sales realization prices of plaintiffs, as threatened by the orders described, will cause plaintiffs and each of them irreparable injury and damage, and constitutes an unlawful procedure as well as a violation by defendants of the provisions of the Bituminous Coal Act of 1937.

9 10. Prior to the entry of the two orders hereinbefore described the Commission made and entered its order No. 15 on July 15, 1937. In that order the Commission recited that to perform effectively its duties under the National Bituminous Coal Act of 1937, it is required to be fully informed as to the production and distribution of bituminous coal, whereupon and pursuant to the authority conferred on it by section 10(a) of said act, it required each producer of bituminous coal, including plaintiffs to file with the Commission a complete report showing the detail costs of tonnage produced and the realization prices derived from the sale of coal; that such reports shall be made separately for each mine, and shall include all coal produced during the calendar year 1936, and all coal sold during the same period; that a copy of said order was sent by the Secretary of the Commission to each known coal producer within the United States, together with the Commission's cost forms Nos. 1 and 1-A. Each producer was required by the order to file, and plaintiffs did file, duly verified reports with the Statistical Bureau of the Commission in the districts within which the reporting mine or mines are located. Order No. 15 contained the following provision:

"The Commission directs special attention to the provisions of section 10 of said Act *relating to the confidential nature of the reports required under this order*, and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

11. That cost forms Nos. 1 and 1-A, accompanying the Commission's order No. 15, described in the preceding paragraph and used by plaintiffs in submitting their detail production costs, selling costs and realization, bore at the top in bold type the assuring statement that:

10 "THIS REPORT IS REQUIRED UNDER THE PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 AND IS THEREFORE CONFIDENTIAL."

That pursuant to the requirements of said order and relying on the confidence imposed by the provisions of section 10 (a) of the act under which authority order No. 15 was issued, as well as the requirement and condition of confidence specified in section 4 (a) Part II, plaintiffs prepared and filed with the Commission complete cost and realization reports for 1936 on forms 1 or 1-A for each of their mines, said reports having been filed with the Statistical Bureau for the respective districts.

12. Section 4 (a) Part II of the Bituminous Coal Act provides:

"All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. *All such records shall be held by the statistical bureau as the confidential* records of the code member filing such information."

The data thus reported is to be used by the Commission in the manner provided in sub-sections (a) and (b) as the basis of proposing and of establishing average minimum prices for the sale and distribution of bituminous coal. Section 10 (a) of the Bituminous Coal Act is as follows:

"The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court

and except that such information may be compiled in composite form in such manner as shall not be injurious
11 to the interests of any producer and, as so compiled, may be published by the Commission."

The data reported by the plaintiffs to the Commission supplies the detail on which "cost of production or sales realization", as referred to in section 10 (a), is based. The information supplied to the Commission by code members, such as plaintiffs, is, under the terms of section 4 (a) Part II, which affirmatively states:

"All such records shall be held by the statistical bureau as the confidential records of the code members filing such information."

13. While section 10 (a) states that "The Commission may require reports from *producers* * * *" it does not, in terms, authorize the Commission to require reports respecting cost of production, sales and distribution from code members.

The only part of the act which requires code members, such as plaintiffs, to furnish details as to the production, costs, sales, distribution, etc, is section 4 (a) Part II, which specifies that such reports, furnished the Commission in accordance with that section, shall remain "the confidential records of the code member filing such information". Plaintiffs believe and aver that it was not the intention of Congress by section 10 (a) of the act to do violence to the provisions of section 4 (a) Part II of the same act, and that the action contemplated by the Commission, based on its construction of section 10 (a), as reflected in its orders of August 31, 1938 hereinbefore described, does violence to that section as well as to section 4 (a) Part II and is therefore unlawful. Plaintiffs further aver that the cost data and realization prices of plaintiffs were submitted by them to the Commission under a condition of confidence, as provided by the Bituminous Coal Act of 1937, and that, in these circumstances, the Commission became then and there required by law and good conscience to preserve in
12 confidence and keep secure, the property rights of plaintiffs in their ownership of such cost data and realization prices, against the disclosure thereof to inter-

ested persons or others for the purpose of inspection, or for any other purpose, except with the consent of the plaintiffs and each of them.

14. Plaintiffs aver that they now regard and have always regarded knowledge of their cost of doing business and of their sales realization as their own valuable and private property, subject to be used and enjoyed by themselves alone. They have at all times zealously and successfully protected information of this character against disclosure to other persons who might thereupon either as consumers or as competitors, or potential competitors, of plaintiffs be able to convert such information to their own uses and advantage, and to the prejudice and disadvantage of plaintiffs. Plaintiffs further aver that their cost data and realization prices are their own valuable property, of which they may not be deprived without their consent; that in submitting such data to the Commission, pursuant to the provisions of the Bituminous Coal Act of 1937, plaintiffs did not give their consent to its disclosure by the Commission at a hearing, or to its disclosure for inspection by interested parties or by others in advance of, or incidental to a hearing.

15. Plaintiffs further aver that the immediate and proximate effect of the threatened disclosure by the defendants and their agents of the cost data and sales realization prices of plaintiffs, will be to make available such information and other private data of plaintiffs to their competitors and consumers of coal, which will cause plaintiffs irreparable injury and damage, in that it will destroy plaintiffs' property right in the information contained in such re-

13 ports, and will lay open such information to plaintiffs' competitors, and others, for such use, profit advantage and enjoyment as they may derive therefrom without limitation whatsoever; and that the use, profit and enjoyment which plaintiffs' competitors and consumers shall derive from such reports and information will naturally and inevitably result in great prejudice to plaintiffs and in irreparable injury to them in the conduct of their business as producers of coal. If said private information of plaintiffs is made available to the public for inspection, as defendants threaten to do, plaintiffs will suffer irreparable injury because *inter alia* customers, with the knowledge

of plaintiffs' costs thus acquired, would demand lower prices; that since certainty of continuous supply of coal is a factor in the purchase of coal, and since coal mines, which have a low cost of production are considered by customers to be most likely to supply coal continuously, the coal producer which has low costs of production would secure business which would otherwise go to the producer with a higher cost of production, and this would cause a loss or transfer of business from producer to producer, and from district to district; that low cost producers would be able to underbid high cost producers; that the credit standing of high cost producers would be impaired, thus making it difficult for them to borrow money; and that no protection would be afforded to plaintiffs even if the information as to their costs, be published without their names being shown, since competitors and others could readily identify the producer by a comparison of the tonnage on the cost sheets with that published by the Bureau of Mines and other organizations.

16. While, under the provisions of section 10 (a) of the Bituminous Coal Act the Commission is empowered to require reports from producers, and may require producers to maintain a uniform system of accounting of costs,
14 wages, operations, sales, etc., and while the producer, as such, is at liberty to disclose his cost of production and sales realization at any hearing before the Commission or in any court or elsewhere, plaintiffs aver that the interpretation of section 10 (a), on which the orders of the Commission of August 31, 1938 are based, is not only not authorized by the provisions of the Bituminous Coal Act of 1937, but is arbitrary unreasonable and in violation of the provisions of that act, and contrary to the spirit and plain intent thereof; that the Commission erred and was arbitrary in holding that the provisions of that act, which require that average minimum prices and marketing rules and regulations must be determined by the Commission after hearing, imposes on the Commission the necessity of either introducing in evidence or making available for inspection by interested parties the invidual cost data and realization prices submitted to the Commission by plaintiffs in confidence under the terms of section 4 (a) Part II, and, further, that the action of the Commission contem-

plated by its orders of August 31, 1938 hereinbefore described, which threaten to disclose the cost data of plaintiffs and each of them, for inspection by interested parties at the whim or discretion of the Commission or of the parties is arbitrary, unreasonable and unlawful.

Plaintiffs further aver that, as the Commission is authorized and required to determine only the weighted average of the total cost of the tonnage for each minimum price area, neither due process nor the statute itself requires that the cost data and other private information of plaintiffs, and each of them, or of coal producers as a class, and without their consent, may be made available for inspection by "interested parties", so that such data will be available for introduction in evidence or not, at the whim or discretion of the Commission or of the interested parties.

15 17. Plaintiffs aver that by reason of the unlawful administration of the Bituminous Coal Act of 1937 by the Commission, as shown by its avowed intention to disclose the cost data and other private information of plaintiffs for inspection by interested parties in certain proceedings before the Commission, plaintiffs are threatened with irreparable injury and will suffer irreparable injury and damage unless defendants are enjoined and restrained as herein prayed.

Plaintiffs have no plain adequate and complete remedy at law in the premises, and only in a suit of this character can the issues here presented be adequately determined and the proper relief had.

Wherefore, plaintiffs pray the Court that it take jurisdiction of this case and cause appropriate process to issue against the defendants and each of them, and require the defendants to answer this bill of complaint, as provided by the rules of this Court and by the law.

Plaintiffs further pray that defendants and each of them and their successors in office and all persons acting or claiming to act under their authority, or by their direction be restrained and enjoined both temporarily, pending the suit, and permanently, at the final hearing, from carrying out the provisions, purposes and acts contemplated by the orders of August 31, 1938 hereinbefore described, and that defendants and each of them be restrained and enjoined from making available for inspection to interested parties or

others, the individual verified cost reports of the Utah and Wyoming plaintiffs at the offices of the Commission in the Central Savings Bank Building in Denver, Col., on and after September 10, 1938, or at any other time or place, and of the individual verified cost reports of the eastern
16 plaintiffs, whose mines are located in Minimum Price Area No. 1 at the offices of the Commission at Washington, D. C., on and after September 15, 1938, or at any other time or place.

Plaintiffs further pray that pending final hearing herein, this Honorable Court forthwith cause to be issued a temporary restraining order and a preliminary injunction in accordance with the rules of this Court enjoining and restraining the defendants and each of them as hereinbefore prayed; that upon final hearing said injunction be made final and perpetual; that upon final hearing of this cause, this Court shall order, adjudge and decree, and also, pursuant to the provisions of the Federal Declaratory Judgment Act, as amended, shall order, adjudge and decree that the cost data and other private information of plaintiffs submitted by them to the Commission in confidence, is their own valuable and private property, which is entitled to the protection of the law, and that without the consent of plaintiffs the defendant Commission and the other defendants are without authority to make such private information available for inspection by parties interested in proceedings before the Commission either before, at, or after hearings of the Commission in such proceedings, and that plaintiffs shall have such other, further and general or special relief as the nature of the case may require and the Court may deem proper and just in the premises.

ROBERT E. QUIRK
Counsel for Plaintiffs.

17 District of Columbia: ss:

Robert E. Quirk, being duly sworn, deposes and says that he is attorney for the plaintiffs herein; that he has read the foregoing bill of complaint and is familiar with the facts and statements therein made, and that the same are true, except as to those stated on information and belief, and, as to those, he believes them to be true.

ROBERT E. QUIRK

Subscribed and sworn to before me this 6th day of September, 1938.

STUART H. ROBESON
Notary Public.

(Notarial Seal)

My Commission Expires: January 15, 1939

18 ***Motion to Dismiss***

Filed September 8, 1938

* * * * * *

To the District Court of the United States
for the District of Columbia:

Come now the defendants, and each of them, and respectfully move this Honorable Court to dismiss the petition filed herein for each of the following reasons:

1. Because this Honorable Court is without jurisdiction to grant the relief prayed for.

2. Because the petition does not state facts sufficient to constitute a cause of action against these defendants, or any of them.

3. Because the Order of the Commission complained of is but a procedural step in a matter wholly within the jurisdiction of the National Bituminous Coal Commission as conferred by the Bituminous Coal Act of 1937.

4. Because the allegations in the petition as to irreparable injury are but mere conclusions, and fail to state any facts as to whether or not plaintiffs, or any of them, have a high or low cost of production, which fact is essential to a showing of damage under the allegations that mines with a low cost of production are considered by customers to be most likely to supply coal continuously, and the coal
19 producer who has the low cost of production would secure business which would otherwise go to the producer with a higher cost of production.

5. Because the cost data which the Commission will make known to interested parties within the proceeding to establish minimum prices is not the current costs of the plaintiffs, or of any other producers, but is the costs incurred by such producers during the year 1936.

6. Because the Bituminous Coal Act of 1937 directs the National Bituminous Coal Commission to establish minimum prices based upon the weighted average cost of pro-

duction for the year 1936, adjusted so as to reflect changes in costs which have been established since January 1, 1936, which weighted average cost of production can be ascertained only by determining the actual costs of the individual producers, in the manner provided by the Act, and said Act further provides that all interested parties must be afforded an opportunity to be heard before any rule or regulation having the force and effect of law may be issued by the Commission, and no such opportunity would or could be afforded interested parties unless they were given full opportunity to examine the underlying data upon which the minimum prices will be predicated.

7. Because the alleged injury which the plaintiffs claim they will suffer if said 1936 costs are disclosed, if an injury at all, is not peculiar to them, but is common to all coal producers within the United States, whether code members or not.

8. Because if plaintiffs suffer any injury it is "damnum absque injuria" in that the Bituminous Coal Act was enacted for the protection of interstate commerce in bituminous coal, and under the scheme adopted by Congress it is necessary for the Commission in establishing the minimum prices, as directed by the Act, to show the basis for its administrative action in a record of a full and fair hearing, and this basis of its action cannot be shown unless the underlying cost figures, upon which minimum prices will be predicated, are disclosed in the proceedings, in order that interested parties, as well as a reviewing court, may be advised as to the evidentiary facts which resulted in the Commission's final determinations.

9. Because the petition on its face discloses that the Commission, after hearing, considered that the disclosure to interested parties of the said cost data was necessary in order that the Commission might proceed intelligently and fairly in establishing minimum prices as directed by the Act.

10. Because the cost data in question was submitted to the Commission pursuant to the provisions of Section 10 (a) of the Act, which Section provides that such data may be disclosed in evidence in any hearing before the Commission or any court, and because the Commission has found that such disclosure is necessary in the proceedings to establish minimum prices in order to afford interested parties a full

and fair hearing as provided by the Act and the Due Process Clause of the Constitution.

11. Because the cost data was submitted to the Commission by the plaintiffs, as well as by all other producers, with full knowledge of the provisions of Section 10 (a) of the Act, under which said cost data was collected by the Commission.

21 12. Because the petition failed to clearly show that the Commission, in disclosing said cost data in evidence, is not conforming to the statutes or is invading any constitutional rights, and because public policy forbids the use of injunction to hamper the Commission in the performance of its important and necessary duties unless it is clear beyond debate that it has failed or refused to conform to the statute or is invading a constitutional right.

Respectfully submitted,

National Bituminous Coal Commission, and
Percy Tetlow,
Pleas E. Greenlee,
Thomas S. Haymond,
John C. Lewis,
Walter H. Maloney,
Clarence E. Smith,
Individually and as Members of the National Bituminous Coal Commission, and
F. W. McCullough,
Individually and as Secretary of the National Bituminous Coal Commission,
Defendants.

By ROBERT W. KNOX
ROBERT L. STERN
THOS. J. O'BRIEN
Their Attorneys

22 *Order*

Filed September 9, 1938

* * *

This cause having come on to be heard on September 8, 1938 on plaintiffs' motion for a temporary injunction upon verified bill of complaint and on defendants' motion to dismiss the bill of complaint, and briefs having been submitted,

and counsel for the parties and for *amici curiae* having been heard orally, and it appearing to the court that the bill of complaint fails to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act of 1937, it is this 9th day of September, 1938:

Ordered, Adjudged, and Decreed that the motion for temporary injunction be denied, that the motion to dismiss the bill of complaint is granted, and that the bill of complaint filed herein be and the same hereby is dismissed.

JOSEPH W. COX
Justice.

Appeal noted from the above decree. Bond is hereby fixed in the sum of One Hundred Dollars ($100.00) or in lieu thereof a cash deposit of Fifty Dollars ($50.00) to be made with the clerk.

JOSEPH W. COX
Justice.

Memorandum

September 9, 1938

$50. deposited by Robt. E. Quirk for plaintiffs in lieu of bond on appeal.

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23 *Plaintiffs' Assignment of Errors*
Filed September 14, 1938.

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Now come the Utah Fuel Company, et al., plaintiffs in the above entitled cause and file the following assignment of errors on which they will rely on their prosecution of the appeal in the above entitled cause from the decree and judgment entered by this Honorable Court on the 9th day of September, 1938, and show in the proceeding, record and judgment in the above entitled cause there was manifest error in the following respects:

1. The Court erred in denying the prayers of the plaintiffs as made in their bill of complaint herein.

2. The Court erred in dismissing the bill of complaint filed herein.

3. The Court erred in granting defendants' motion to dismiss the bill of complaint.

4. The Court erred in refusing to issue a writ of injunction, as prayed for in the said bill of complaint, and in the motion made by plaintiffs for such a writ.

Wherefore said plaintiffs pray that said judgment and decree of the District Court of the United States for the District of Columbia may be reversed, and that said Court be directed to grant such other and further relief as may seem proper.

ROBERT E. QUIRK,
Counsel for Plaintiffs.

Service accepted:

ROBERT L STERN
Counsel for Defendants.

Sept 14, 1938

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24 *Designation of Record*
Filed September 14, 1938.

* * *

Now come the Utah Fuel Company, et al., plaintiffs in the above entitled cause, and the National Bituminous Coal Commission, et al., defendants in the above entitled cause, and designate the parts of the record which they desire to have included in the transcript, said parts being considered sufficient for the determination of the question raised on appeal, namely:

1. Plaintiffs' verified bill of complaint.
2. Defendants' motion to dismiss.
3. Decree of the Court of September 9, 1938, which denied plaintiffs' motion for a temporary injunction, which granted defendants' motion to dismiss the bill of complaint, and which ordered, adjudged and decreed that the bill of complaint be dismissed.
4. Note of appeal in open court and action of the Court fixing appeal bond authorizing deposit in lieu thereof, and docket entry showing such deposit, as noted on the face of the decree of the Court.
5. Plaintiffs' assignment of errors.
6. This designation.

ROBERT E. QUIRK,
Counsel for Plaintiffs.
ROBERT L STERN
Counsel for Defendants.

25 District Court of the United States
For the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 68049 in Equity, wherein Utah Fuel Company, et al., are Plaintiffs and National Bituminous Coal Commission, et al., are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of September, 1938.

C. E. STEWART,
(Seal) Clerk.

Endorsed on cover: No. 7247. Utah Fuel Co. et al., Appellants, vs. National Bituminous Coal Commission, et al. United States Court of Appeals for the District of Columbia. Filed Sep 16 1938. Joseph W. Stewart, Clerk.

[fol. 22] Monday, October 3rd, A. D. 1938.

No. 7247

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

The argument in the above entitled cause was commenced by Mr. J. V. Norman, attorney for appellants, continued by Mr. Robert L. Stern, attorney for appellees, and Mr. Allen Coe as amicus curiae for Consumers Counsel, and concluded by Mr. J. V. Norman, attorney for appellants.

[fol. 23] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7247

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

Appeal from the District Court of the United States for the District of Columbia

Decided December 5, 1938

Robert E. Quirk, of Washington, D. C., and J. V. Norman, of Louisville, Kentucky, for appellants.

Robert W. Knox, General Counsel, and Thomas J. O'Brien, Attorney, National Bituminous Coal Commission, and Robert L. Stern, Special Assistant to the Attorney General, all of Washington, D. C., for appellees.

By leave of Court, Allen Coe and Orville H. Walburn, both of Washington, D. C., filed a brief on behalf of Consumers' Counsel of the National Bituminous Coal Commission as amicus curiae.

By leave of Court, Clarence A. Miller, of Washington, D. C., filed a brief on behalf of Aberdeen and Rockfish Railroad Company, et al. as amici curiae.

Before Groner, Chief Justice, and Miller and Vinson, Associate Justices

MILLER, Associate Justice:

Appellants prepared and filed with appellee, National Bituminous Coal Commission, cost data and sales realization reports on forms supplied by the Commission pursuant to the provisions of the Bituminous Coal Act of 1937.[1] Thereafter the Commission ordered its secretary to make such reports available for inspection by interested persons in advance of hearings at Denver, Colorado, and Washington, D. C. In their bill, filed in the lower court, appellants alleged inter alia that the reports were filed by them as members in good standing of the Bituminous Coal Code; that the Act imposes upon appellees the duty to treat the data contained in the reports in confidence as the private property of appellants; that the threatened disclosure of such data will cause irreparable injury and damage to their business and property; and prayed (1) that appellees be restrained from carrying out the orders for such disclosure; (2) that the court should order, adjudge and decree, pursuant to the provisions of the Federal Declaratory Judg- [fol. 24] ment Act (Jud. Code § 274d, U. S. C. A. § 400 (Supp. 1938)), that, except with the consent of appellants, appellees are without authority to make available for inspection the data and information submitted by appellants to the Commission. This appeal is from the decree of the lower court denying an injunction and dismissing the bill of complaint.

In Mallory Coal Company v. National Bituminous Coal Commisssion, (No. 7178, decided August 1, 1938)—— F. (2d) ——, —— App. D. C. ——, this court held that an order of the Commission, identical in purpose and effect with the one complained of in appellants' bill, was preliminary and procedural in character, and hence not subject to judicial review. It is apparent, therefore, that appellants are, in the present case, attempting to achieve indirectly[2] a result

[1] 50 Stat. 88, 15 U. S. C. A. § 840 (Supp. 1938).

[2] See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51.

which was denied in the Mallory case, i. e., judicial review of a preliminary and procedural order of an administrative agency.

It is a well established rule that available administrative remedies must be exhausted before judicial review can properly be given,[3] and that, except as hereinafter noted, preliminary procedural orders of administrative agencies are not subject to judicial review.[4]

The jurisdictional question whether the order complained of is reviewable is basic and cannot be waived by the parties.[5] One of the important reasons for requiring exhaustion of administrative remedies is to prevent the transfer to courts of duties imposed by law upon administrative agencies. Waivers of such questions in order to secure judicial review cannot give jurisdiction on appeal. "Primary single-

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[3] Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51; Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 172; Porter v. Investors Syndicate, 286 U. S. 461, 468; United States v. Illinois Central R. R., 291 U. S. 457, 463; First Nat. Bank v. Board of County Commissioners, 264 U. S. 450, 455; Gorham Mfg. Co. v. State Tax Comm., 266 U. S. 265, 269-270; Red River Broadcasting Co., Inc., v. Federal Communications Comm., 98 F. (2d) 282, 284, —— App. D. C. ——, cert. denied, —— U. S. ——. Cf. Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300, 311; United States v. Abilene & Southern Ry., 265 U. S. 274, 282; Delaware and Hudson Co. v. United States, 266 U. S. 438, 449.

[4] Federal Power Comm. v. Metropolitan Edison Co., supra note 3; United States v. Illinois Central R. R., 244 U. S. 82. See also, Jones v. Securities and Exchange Comm., 2 Cir., 79 F. (2d) 617, 619, cer. denied, 297 U. S. 705, wherein such orders were likened to interlocutory orders of a court.

[5] United States v. Griffin, 303 U. S. 226, 229; Houston Natural Gas Corp. v. Securities and Exchange Comm., 4 Cir., (No. 4389, decided November 10, 1938), —— F. (2d) ——. See also, Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160, 174; Piedmont & Northern Ry. v. United States, 280 U. S. 469, 478; Reid v. United States, 211 U. S. 529, 539; Southland Industries, Inc. v. Federal Communications Comm., 99 F. (2d) 117, —— App. D. C. ——; Woodmen of the World Life Ins. Assn. v. Federal Communications Comm., 99 F. (2d) 122, —— App. D. C. ——

ness of action and unity" are imperative, and this would b destroyed by substituting the court for the Commission or b creating a divided authority in the determination of such questions.[6]

[fol. 25] It is also a well established rule that orders o federal administrative agencies may be reviewed only in the courts and pursuant to the procedures specified by Congress in the pertinent statutes.[7] It is apparent from the language of the Bituminous Coal Act that Congress intended all interested persons, who desired to do so, to seek relief pursuant to the administrative procedure therein provided;[8] that it intended judicial review of the Commission's orders to be given exclusively by the United States circuit courts of appeals or by the United States Court of Appeals for the District of Columbia.[9]

In some instances Congress has provided for judicial review of administrative action by use of the writ of injunction, as in the case of the Interstate Commerce Com-

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[6] See Procter & Gamble Co. v. United States, 225 U. S. 282, 298-299; Standard Oil Co. v. United States, 283 U. S. 235, 241; Lehigh Valley R. R. v. United States, 243 U. S. 412; Manufacturers Ry. v. United States, 246 U. S. 457, 483; Jones v. Securities and Exchange Comm., 2 Cir., 79 F. (2d) 617, cert. denied, 297 U. S. 705.

[7] Securities and Exchange Comm. v. Andrews, 2 Cir., 88 F. (2d) 441, cited with approval in Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385; American Sumatra Tobacco Corp. v. Securities and Exchange Comm., 93 F. (2d) 236, 241, 68 App. D. C. 77, 82; Sykes v. Jenny Wren Co., 78 F. (2d) 729, 64 App. D. C. 379, cert. denied, 296 U. S. 624; Monocacy Broadcasting Co. v. Prall, 90 F. (2d) 421, —— App. D. C. ——; Jones v. Securities and Exchange Comm., 2 Cir., 79 F. (2d) 617, 619, cert. denied, 297 U. S. 705; Black River Valley Broadcasts, Inc. v. McNinch, (No. 7170, decided November 21, 1938) —— F. (2d) ——, —— App. D. C. ——. Cf. Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160.

[8] Sections 6(a), 12, 15, 50 Stat. 72, 85, 88, 90, 15 U. S. C. A. §§ 836(a), 842, 845 (Supp. 1938). See Mallory Coal Co. v. National Bituminous Coal Comm., (No. 7178, decided August 1, 1938) —— F. (2d) ——, —— App. D. C. ——.

[9] Section 6(b), 50 Stat. 72, 85, 15 U. S. C. A. § 836(b) (Supp. 1938).

mission.[10] In others it has provided for alternative review by appeal or by writ of injunction as in the case of the Radio Act of 1927.[11] In other instances, as in the Bituminous Coal Act, Congress has made no express provision for injunctive relief. It is twice provided in the Act that the United States Court of Appeals for the District of Columbia and the United States circuits courts of appeals shall have exclusive jurisdiction to enforce, set aside or modify orders of the Commission.[12]

For a number of reasons injunctive relief is not a proper remedy in the present case. If it should appear that in a particular statute no adequate provision had been made for judicial relief, the writ of injunction might perhaps be the only proper available remedy.[13] But the rule is otherwise [fol. 26] when adequate provision has been made for judicial

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[10] Urgency Deficiences Act of October 22, 1913, 38 Stat. 208, 219, 220, 28 U. S. C. A. §§ 41 (28), 46, 47. See Skinner & Eddy Corp. v. United States, 249 U. S. 557, 563.

[11] 44 Stat. 1169 (But note such alternative review was limited to orders revoking station licenses.). Cf. Communications Commission Act of 1934 48 Stat. 1093, 1099, 47 U. S. C. A. §§ 402(b) (2), 414 (Supp. 1938). But see Monocacy Broadcasting Co. v. Prall, 90 F. (2d) 421, —— App. D. C. ——, and Sykes v. Jenny Wren Co., 78 F. (2d) 729, 64 App. D. C. 378, cert. denied, 296 U. S. 624. See also, Black River Valley Broadcasts, Inc. v. McNinch, (No. 7170, decided November 21, 1938) —— F. (2d) ——, —— App. D. C. ——.

[12] Section 6(b), (d), 50 Stat. 72, 85, 86, 15 U. S. C. A. § 836(b), (d) (Supp. 1938).

[13] See Shields v. Utah Idaho Central R. R., (No. 28, decided this day) —— U. S. ——; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50; Anniston Mfg. Co. v. Davis, 301 U. S. 337, 343 et seq.; Kansas City So. Ry. v. May, 8 Cir., 2 F. (2d) 680, 687. See also, United States v. Los Angeles & Salt Lake R.R., 273 U. S. 299, 312; United States v. Griffin, 303 U. S. 226, 238; Federal Trade Comm. v. Millers' Nat. Federation, 23 F. (2d) 968, 57 App. D. C. 360, cert. denied, 274 U. S. 743; South Porto Rico Sugar Co. v. Munoz, 1 Cir., 28 F. (2d) 820. Cf. Appalachian Elec. Power Co. v. Smith, 4 Cir., 67 F. (2d) 451, cert. denied, 291 U. S. 674; Carolina Aluminum Co. v. Federal Power Comm., 4 Cir., 7 F. (2d) 435.

review,[14] and in this respect the provisions of the Bituminous Coal Act are clearly adequate. The language of the Act is almost word for word identical in this respect with the review provision of the Securities and Exchange Act,[15] and of the Federal Power Act.[16] It also resembles closely the review provision of the National Labor Relations Act;[17] of which the Supreme Court has said:

> Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court.[18]

Equally inclusive review will be available from a final order of the National Bituminous Coal Commission and will provide full opportunity for challenging and testing its procedural order here involved.

Again, even where Congress has expressly provided for review by means of writ of injunction—as in the case of the Interstate Commerce Commission[19]—relief has been denied where the order sought to be enjoined was, as in the present case, a mere step in procedure;[20] and even

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[14] See cases cited in preceding note, and see also, Shields v. Utah Idaho Central R. R., (No. 28, decided this day) —— U. S. ——; Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160, 174; Federal Trade Comm. v. Maynard Coal Co., 22 F. (2d) 873, 57 App. D. C. 297.

[15] 48 Stat. 901, 15 U. S. C. A. § 78y(a) (Supp. 1938). See Securities and Exchange Comm. v. Andrews, 2 Cir., 88 F. (2d) 441.

[16] 49 Stat. 860, 16 U. S. C. A. § 825l(b) (Supp. 1938). See Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375; Newport Elec. Corp. v. Federal Power Comm., 2 Cir., 97 F. (2d) 580.

[17] 49 Stat. 449, 455, 29 U. S. C. A. § 160(f) (Supp. 1938).

[18] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 47; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 49. See also, Anniston Mfg. Co. v. Davis, 301 U. S. 337, 345-346.

[19] 38 Stat. 208, 219, 220, 28 U. S. C. A. §§ 41(28), 46, 47, supra note 10.

[20] United States v. Illinois Central R. R., 244 U. S. 82; New York, O. & W. Ry. v. United States, S. D. N. Y., 14 F. (2d) 850, aff'd., 273 U. S. 652. See Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 384–385.

though in some cases no other review may be available.[21] [fol. 27] Moreover, even in a suit properly brought, in a case of which an equity court has jurisdiction, injunctive relief cannot be given, where the action sought to be enjoined involves a judgment based upon an exercise of discretion by an administrative agency in a matter properly within its jurisdiction.[22] The issuance of an injunction in

[21] See Piedmont & Northern Ry. v. United States, 280 U. S. 469, 477; Great Northern Ry. v. United States, 277 U. S. 172, 182. See also, United States ex rel. Chicago Great Western R. R. v. Interstate Commerce Comm., 294 U. S. 50, 62; United States ex rel. Kansas City So. Ry. v. Interstate Commerce Comm., 98 F. (2d) 268, 68 App. D. C. 396, cert. denied, —— U.S., ——; Newport Elec. Corp. v. Federal Power Comm., 2 Cir., 97 F. (2d) 580; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 325. Cf. Shields v. Utah Idaho Central R. R., (No. 28, decided this day) —— U. S. ——.

Orders of the Interstate Commerce Commission may be subjected to statutory injunction only when they are final in the sense that they dispose of controversies, as distinguished from being merely a part of the preliminary stage of the proceedings in a controversy. United States v. Illinois Central R. R., 244 U. S. 82, 88, 89. Consequently, an order merely declaratory of the rights of the parties without granting or denying relief and without compelling or restraining action is not subject to attack. Piedmont & Northern Ry. v. United States, supra. Cf. Procter & Gamble Co. v. United States, 225 U. S. 282; Hooker v. Knapp, 225 U. S. 302; The Chicago Junction Case, 264 U. S. 258, 264. The same is true of orders merely tentative which do not determine the rights of parties. United States v. Los Angeles & Salt Lake R. R., 273 U. S. 299, 308–309, 314; Delaware and Hudson Co. v. United States, 266 U. S. 438, 449. See United States v. Atlanta, Birmingham & Coast R. R., 282 U. S. 522, 527–528. See generally, Tollefson, Judicial Review of the Decisions of the Interstate Commerce Commission, 5 Geo. Wash. L. Rev. 503, 535 et seq.

[22] See Proctor & Gamble Co. v. Coe, 96 F. (2d) 518, 68 App. D. C. 246, cert. denied, —— U. S. ——, and authorities there cited. See also, United States ex rel. Kansas City So. Ry. v. Interstate Commerce Comm., 98 F. (2d) 268, 68 App. D. C. 396, cert. denied, —— U. S. ——, and authorities there cited.

the present case would require a determination that the Commission's order was plainly and palpably erroneous and violative of a ministerial duty imposed by law beyond peradventure clear. Although it may be argued that such a duty appears to have been imposed by Section 4(a) of the Act, requiring that the cost data and sales realization reports solicited by the Commission be kept secret, it may be just as persuasively argued that the provisions of Section 10(a) permit the introduction of such material into evidence at any hearing before the Commission. The question may be properly reviewed and determined when it comes to us on appeal from a final order, but it is not before us at this time. The statute being ambiguous, and the construction placed thereon by the Commission being a possible one, injunctive relief at this time is not a proper remedy in any event.[23]

Appellants' bill in the lower court also sought relief under the provisions of the Federal Declaratory Judgment Act. Jud. Code § 274d, 28 U. S. C. A. § 400 (Supp. 1938). But the procedure of that Act is not available to appellants. As was said by Sibley, J., in Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F. (2d) 97, 100, cert. denied, 299 U. S. 559: "The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin." The statute does not add to the jurisdiction of the federal courts, or create any new substantive right.[24] It is a procedural statute, which adds a remedy for use in cases of which federal courts already have jurisdiction.[25] The Fed-

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[23] United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324; Louisiana v. McAdoo, 234 U. S. 627, 633; New Orleans v. Paine, 147 U. S. 261; Wilbur v. United States ex rel. Kadrie, 281 U. S. 206, 218–219; United States ex rel. Chicago Great Western R. R. v. Interstate Commerce Comm., 294 U. S. 50, 61; Proctor & Gamble Co. v. Coe, 96 F. (2d) 518, 68 App. D. C. 246, cert. denied, —— U. S. ——, and authorities there cited.

[24] Ohio Casualty Ins. Co. v. Marr, 10 Cir., 98 F. (2d) 973, 975; Board of Commissioners v. Cockrell, 5 Cir., 91 F. (2d) 412, cert. denied, 302 U. S. 740.

[25] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240; Aetna Casualty & Surety Co. v. Quarles, 4 Cir., 92 F. (2d)

eral Declaratory Judgment Act "does not enlarge the scope of equity jurisdiction to permit its application to controversies which have not yet reached the judicial stage." [26] [fol. 28] The controversy must be one which is appropriate for judicial determination.[27] It is necessary, in order to insure the effectiveness of administrative procedures, that interested and aggrieved persons be required to exhaust administrative remedies before seeking judicial review or judicial interference.[28]

To permit judicial review, either by injunction or by declaratory judgment, of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings[29] and would render orderly administrative procedure impos-

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321; Putnam v. Ickes, 78 F. (2d) 223, 64 App. D. C. 339, cert. denied, 296 U. S. 612; Southern Pac. Co. v. McAdoo, 9 Cir., 82 F. (2d) 121, 122; Gully v. Interstate Natural Gas Co., 5 Cir., 82 F. (2d) 145, 149; Borchard, The Federal Declaratory Judgments Act, 21 Va. L. Rev. 35, 39.

[26] Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F. (2d) 97, 100, cert. denied, 299 U. S. 599. See also, Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325; United States v. West Virginia, 295 U. S. 463, 475; Putnam v. Ickes, 78 F. (2d) 223, 226, 64 App. D. C. 339, 342, cert. denied, 296 U. S. 612.

[27] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240; Stephenson v. Equitable Life Assur. Soc., 4 Cir., 92 F. (2d) 406, 409. See Securities and Exchange Comm. v. Andrews, 2 Cir., 88 F. (2d) 441, cited with approval in Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385.

[28] See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51, and cases there cited. See also, Adams v. Nagle, 303 U. S. 532, 543: "It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible."

[29] Cf. Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 383–384.

sible.[30] Moreover, it would result in bringing to the courts such an avalanche of trival procedural questions as largely to monopolize their time and energies.[31] That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regrettable but not controlling factor under such circumstances.[32] Injury may result also from judicial determinations[33] and from direct legislative action. " * * * the expense and annoyance of litigation is 'part of the social burden of living under government.' "[34] Presumably Congress balanced the various considerations of private convenience and public policy when it enacted the Bituminous Coal Act.

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[30] See Adams v. Nagle, 303 U. S. 532, 543. Cf. United States v. Griffin, 303 U. S. 226, 236–237.

[31] See Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160.

[32] Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385: "So attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41. See also, Securities & Exchange Comm'n v. Andrews, 88 F. (2d) 441." See United States v. Los Angeles & Salt Lake R. R., 273 U. S. 299, 314.

[33] See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51–52.

[34] Petroleum Exploration, Inc. v. Public Service Comm., 304 U. S. 209, 222; Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F. (2d) 97, 100, cert. denied, 299 U. S. 559.

In Heller Bros. Co. v. Lind, 86 F. (2d) 862, 864, 66 App. D. C. 306, 308, cert. denied, 300 U. S. 672, we said, citing Bradley Lumber Co. v. National Labor Relations Board, supra: "And, if the act should subsequently be held to be unconstitutional in a proper case, these losses will have to be borne without redress. But—as was said by Judge Sibley in a similar case in the Fifth Circuit—these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage as to which equity will interfere to prevent."

The lower court was without jurisdiction and the motion to dismiss was properly granted. Consequently, it is unnecessary for us to consider appellants' other contentions.

Affirmed.

[fol. 29] Monday, December 5th, A. D. 1938.

No. 7247, October Term, 1938

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants,

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

Appeal from the District Court of the United States for the District of Columbia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Miller.

December 5, 1938.

[fol. 30] Saturday, December 10th, A. D. 1938.

No. 7247, October Term, 1938

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants,

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

Order

On consideration of the following motions and petitions filed herein:

Appellees' motion for interpretation or dissolution of injunction pending appeal, filed December 8, 1938; Appellants'

motion to continue in effect injunction heretofore granted pending disposition of petition for rehearing and for stay pending application for certiorari in event petition for rehearing be overruled and for stay pending final disposition in event certiorari be granted, filed December 9, 1938; Appellants' petition for rehearing and application for stay for 15 days in order to permit appellants to apply to Supreme Court for certiorari and stay order, filed December 9, 1938;

It is ordered by the Court that the petition for rehearing be, and it is hereby, denied,

It is further ordered by the Court that the mandate of this Court herein be, and it is hereby, stayed until the 10th day of January, 1939, and that, in order to maintain the status quo pending the application for certiorari, the injunction heretofore issued by this Court is hereby continued in force and effect pending action by the Supreme Court, conditioned, however, upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within 10 days from the date of this order.

Dated December 10, 1938.

Per Curiam:

[fol. 31] In the United States Court of Appeals for the District of Columbia, October Term, 1938

No. 7247

United States Court of Appeals for the District of Columbia.
Filed Dec. 14, 1938. Joseph W. Stewart, Clerk.

Utah Fuel Company, et al., Appellants,

vs.

National Bituminous Coal Commission, et al., Appellees

Designation of Record

Now come the Utah Fuel Company, et al., appellants in the above entitled cause, and, for use in a petition for a writ of certiorari which appellants will file in the Supreme Court of the United States, designate the parts of the record which they desire to have included in the transcript, said parts

being considered sufficient for the determination of the questions to be raised on certiorari, namely:

1. Printed record in the Court of Appeals;
2. Minute showing argument;
3. Opinion of the Court of December 5, 1938;
4. Judgment of the Court of December 5, 1938;
5. Order of the Court denying appellants' petition for rehearing of December 10, 1938;
6. Order of the Court of December 10, 1938 granting injunction;
7. Clerk's certificate;
8. Together with a copy of this designation.

J. V. Norman, Robert E. Quirk, Counsel for Appellants.

Service of above designation accepted this 13th day of December, 1938.

Robert L. Stern, Special Assistant to the Attorney General. Robert W. Knox, General Counsel, National Bituminous Coal Commission.

[fol. 32] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 31, inclusive, constitute true copies of the transcript of record and proceedings of the said Court of Appeals as designated by counsel for Appellants in the case of: Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al., Appellants, vs. National Bituminous Coal Commission and Percy Tetlow, Pleas E. Greenlee, et al. No. 7247, October Term, 1938, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this Fifteenth day of December —, A. D. 1938.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 19, 1938

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted, and the case is assigned for argument on Tuesday, January 3, 1939, after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 16 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL.,
Petitioners,

v.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF THEREON.

J. V. NORMAN,
ROBERT E. QUIRK,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. .....

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL.,
Petitioners,

v.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF THEREON.

To the Supreme Court of the United States:

The Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, Royal Coal Company, Spring Canyon Coal Company, United States Fuel Company, Chesterfield Coal Company, Hi-Heat Coal Company, Sheridan-Wyoming Coal Company, Hotchkiss Coal Company, Mallory Coal Company, Carbon Fuel Company, Dix-

port Coal Company, The Hanna Coal Company of Ohio, Pittsburgh Coal Company, Jamison Coal and Coke Company, Westmoreland Coal Company, Rochester and Pittsburgh Coal Company and Hillman Coal & Coke Company, jointly and severally petition this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia, to remove from that Court for review here, the record in the case therein, No. 7247, *Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al.*, v. *National Bituminous Coal Commission, and Percy Tetlow, Pleas E. Greenlee, et al.*, wherein petitioners are appellants and the National Bituminous Coal Commission and the members thereof are appellees, in which case that Court announced its decision not yet reported, and order December 5, 1938, in which decision the respondents herein were the successful parties adversary to these petitioners.

Statement of Case.

The decision sought to be reviewed affirmed the judgment of the District Court of the United States for the District of Columbia, dismissing petitioners' bill of complaint for injunction and petition for declaratory judgment, and denying a motion for temporary injunction (R. 29). Inasmuch as defendants moved to dismiss the bill of complaint, there is no dispute as to the facts, and except as otherwise noted, the statement of the case is derived from petitioners' bill of complaint (R. 3-15). The controversy herein involves the construction of various provisions of the Bituminous Coal Act of 1937, set out below, but, as will appear from the opinion of the Court below, that court held it had no jurisdiction to decide such controversy.

The Bituminous Coal Act of 1937 created the Commission whose duty it is, among other things, to prescribe by order, after notice and hearing, minimum prices to be charged by producers of coal who are members of the Bituminous Coal Code for coal sold by them which is subject to the Code.

Petitioners are, and at all times mentioned in the bill of complaint have been, members in good standing of the Bituminous Coal Code, promulgated by the respondent Commission. The provisions of the Bituminous Coal Code are prescribed in the Act. These minimum prices are related to cost of production, and in order that the Commission may know what these costs of production are, the Act provides for the submission to the Commission by producers of data disclosing their costs and sales realization (Appendix p. 30). Section 4, Part II, of the Act, provides in part as follows:

> "The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:
>
> "(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information."

Section 10 (a) of the Act provides as follows:

> "Sec. 10 (a). The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be

injurious to the interests of any producer and, as so compiled, may be published by the Commission."

On July 15, 1937, the Commission entered its Order No. 15. In that order the Commission recited that to perform effectively its duties under the National Bituminous Coal Act of 1937, it was required to be fully informed as to the production and distribution of bituminous coal, and that pursuant to the authority conferred on it by Section 10 (a) of the Act, each producer of bituminous coal, including petitioners, was directed to file with the Commission a complete report showing the detailed cost of tonnage produced and realization prices derived from the sale of coal; that such reports were to be made separately for each mine and to include all coal produced during the calendar year 1936 and all coal sold during the same period. A copy of this order was sent by the Secretary of the Commission to each known coal producer within the United States, together with cost forms, which the Commission had provided for the making of such reports. Each producer was required by the order to file, and the petitioners did file, duly verified reports with the Statistical Bureau of the Commission for the district within which the reporting mine or mines were located. The order referred to contained the following provision:

"The Commission directs special attention to the provisions of section 10 of said Act relating to the confidential nature of the report required under this order, and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

The cost forms prepared by the Commission accompanying the Commission's order, which were used by petitioners in submitting their detailed production costs and sales realization, bore at the top in bold type, the following statement:

"THIS REPORT IS REQUIRED UNDER THE PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 AND IS THEREFORE CONFIDENTIAL."

Petitioners as members in good standing of the Bituminous Coal Code, and pursuant to the requirement of said order and the provision of Section 4, and relying on the confidence imposed by such provision, as well as the statement above quoted, prepared and filed with the Statistical Bureau of the Commission, for their respective districts, complete cost and realization reports for 1938 for each of their mines.

After these reports had been thus filed by petitioners, the Commission, on March 30, 1938, made and promulgated a ruling in which it announced that it would thereafter give public notice of a hearing to be held to determine the weighted average of the total costs of the tonnage of coal for each minimum price area (as defined in the Act), in the calendar year 1936, adjusted as provided in Section 4, Part II, of the Act. In its ruling the Commission further announced that at such hearing the information obtained from individual coal producers with respect to individual costs of production of coal of such producers in the calendar year 1936 would be made available by the Commission for inspection and introduction in evidence for certain specified purposes, and that it construed Section 10 (a) of the Act as authorizing such a disclosure in such manner and under such circumstances.

Thereafter certain of the petitioners herein filed a petition with the Commission, which objected to the Commission's ruling of March 30, 1938, as erroneous, and which prayed, *inter alia*, for a hearing, and that upon consideration of the facts and circumstances recited in the petition and the provisions of the Bituminous Coal Act of 1937, the Commission vacate the ruling and rescind its construction of Section 10 (a) of the Act. The Commission thereupon assigned that petition for hearing and the petitioner, Mallory Coal Company, and certain other coal producers, participated in that hearing. As a result thereof, on June 1, 1938, the Commission filed its report, findings of fact, and opinion, and made and entered an order as of that date. In

that order the Commission adhered to its ruling of March 30, 1938, reciting the substance of the petitions and the evidence of injury, and thereupon denied said petitions and ordered and directed:

> "That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

The petitioner, Mallory Coal Company, and certain other coal producers, believing that the Bituminous Coal Act of 1937 properly construed prohibited the Commission from disclosing the cost and sales realization data filed by them with the Commission in the manner threatened, and being thus aggrieved by the order of the Commission of June 1, 1938, filed a petition for review by the United States Court of Appeals for the District of Columbia, pursuant to the provisions of Section 6 (b) of the Act. That petition was heard and considered by that Court, and on August 1, 1938, in No. 7178, *Mallory Coal Company, et al.* v. *National Bituminous Coal Commission*, 99 Fed. (2) 399, the Court dismissed the petition on the ground, *inter alia*, that the order entered by the Commission was not a reviewable order under the provisions of Section 6 (b).

On August 31, 1938, the Commission made and entered orders directing the Secretary of the Commission to cause the verified cost reports of all the individual producers in the various districts, including petitioners, "to be made available for inspection during business hours", on and after certain dates named in the order, by those interested parties who had filed appearances in the proceeding before the Commission.

Still believing that the Act properly construed prohibited the Commission from disclosing their costs and sales realization data in the manner threatened, having no remedy at

law or by way of review, and being threatened with action which would subject them to irreparable injury, the petitioner, Mallory Coal Company, as well as these other petitioners, on September 7, 1938, instituted this action in the United States District Court for the District of Columbia, to enjoin the Commission from making the threatened disclosure, and praying for a declaratory judgment. The District Court filed no opinion, but in its order dismissing the bill of complaint and denying the motion for a temporary injunction (R. 18), stated that the acts sought to be enjoined were authorized by and not in violation of the Bituminous Coal Act of 1937. On application of petitioners to the United States Court of Appeals for the District of Columbia, an injunction pending appeal was granted, whereby the defendants were enjoined "from making available for inspection by interested parties, or others, the individual verified cost reports of the petitioners, as described in the bill of complaint and in the orders of the National Bituminous Coal Commission, promulgated August 31, 1938, in Docket 15, of said Commission". Thereafter, on December 5, 1938, in No. 7247, *Utah Fuel Company et al.* v. *National Bituminous Coal Commission, et al.*, the United States Court of Appeals for the District of Columbia affirmed the judgment of the lower Court dismissing the bill and denying the motion for injunction, on the ground, as appears from the opinion of that Court filed herewith as a part of the record, that the District Court did not have jurisdiction either under its general equity jurisdiction or under the Declaratory Judgments Act, to determine the legality of the Commission's threatened action (R. 23-28).

On December 8th petitioners filed with the United States Court of Appeals for the District of Columbia their petition for rehearing, wherein, among other things, they called the Court's attention to the apparent conflict between its decision and the decision of this Court in the case of *Shields, et al.* v. *Utah-Idaho Central R. Co.*, as hereinafter set forth. At the same time petitioners filed with said Court a motion for stay pending disposition of the petition for rehearing,

and, in the event it be denied, pending action by this Court. On December 10, 1938, the Court of Appeals of the District of Columbia entered the following order (R. 30):

> "It is ordered by the Court that the petition for rehearing be, and it is hereby, denied.
>
> "It is further ordered by the Court that the mandate of this Court herein be, and it is hereby, stayed until the 10th day of January, 1939, and that, in order to maintain the status quo pending the application for certiorari, the injunction heretofore issued by this Court is hereby continued in force and effect pending action by the Supreme Court, conditioned, however, upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within 10 days from the date of this order."

Grounds Relied on for Allowance of Writ.

The grounds relied on by petitioners for the allowance of the writ are:

1. The United States Court of Appeals for the District of Columbia failed to give proper effect to an applicable decision of this Court, in that it failed to apply and follow the decision of this Court in the case of *Shields, et al.* v. *Utah-Idaho Central R. Co.*, handed down on December 5, 1938, the same day upon which the opinion and judgment of the United States Court of Appeals for the District of Columbia was rendered. By petition for rehearing, filed by appellants on the 8th day of December, 1938, the attention of the United States Court of Appeals for the District of Columbia was called to the apparent conflict between its opinion in this case and the opinion of this court in *Shields, et al.* v. *Utah-Idaho Central R. Co.*, but by order entered on the 10th day of December, 1938, said petition was denied. In *Shields, et al.* v. *Utah-Idaho Central R. Co.*, this Court held that "equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal action", and this although the determination of the Interstate Commerce Commission, there involved, was

an "order" reviewable under the Urgent Deficiencies
t of October 22, 1913, as had already been held by this
urt in *Shannahan* v. *U. S.*, 303 U. S. 596. The holding
the United States Court of Appeals for the District of
lumbia, that appellants are without remedy in a court
equity because the action sought to be enjoined was re-
wable only by a United States Circuit Court of Appeals
the United States Court of Appeals for the District of
umbia, and further that a court of equity is without
isdiction to grant relief because the threatened injury
se in the course of a proceeding before the National Bi-
minous Coal Commission, is in direct conflict, as peti-
ners submit, with the holding of this court in the case of
elds, et al. v. *Utah-Idaho Central R. Co., supra.*

. The United States Court of Appeals for the District
Columbia has, in basing its decision on the grounds
ted, decided a question of general importance. The de-
on of the Court of Appeals in this case must be con-
ered in connection with its decision in No. 7178, *Mallory*
l Co., et al. v. *National Bituminous Coal Commission,*
ra. Taken together, these two decisions mean that ad-
inistrative bodies in connection with what are called "pro-
ural" matters, may violate with impugnity the statute
m which they derive their authority, in doing so inflict
n persons subject thereto irreparable injury, and at
same time escape judicial control. It is important to
r in mind that, unlike the situation in other cases this
rt has been called upon to decide, if the decision of the
urt of Appeals be not reversed there is no way known
petitioners whereby the legality of an administrative
y's action in relation to a "procedural" matter, which
ion inflicts on persons subject to its jurisdiction irrepar-
e damage, can be tested in a judicial proceeding. In
w of the multiplication in recent years of their powers,
itioners believe this is a most important case.

. This case also involves a question of substance relating
the construction and application of a statute of the

United States which has not been, but should be, settled by this Court, viz., whether the Bituminous Coal Act of 1937, properly construed, prohibits the National Bituminous Coal Commission from disclosing the individual costs and sales realization data filed with it by the individual producers. Inasmuch as the Commission in construing the act to authorize such disclosure does so because in its opinion to do otherwise would raise serious constitutional questions as to the "fairness" of a hearing upon the basis of which its price fixing order is issued, all of which appears, on pages 16-17 of the record filed herewith, from paragraphs 6, 8, 9 and 10 of respondents' motion to dismiss the complaint, this case also involves a question of substance relating to the construction and application of the Constitution of the United States which has not been, but should be, settled by this Court.

Prayer for Relief.

In view of the foregoing, petitioners respectfully pray that a writ of certiorari issue, under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, requiring it to certify and send to this Court a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 7274, *Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al., Appellants* v. *National Bituminous Coal Commission, and Percy Tetlow, Pleas E. Greenlee, Thomas S. Haymond, Individually, etc., et al., Appellees,* to the end that this cause may be reviewed and determined by this Court, and that the judgment herein of the said United States Court of Appeals for the District of Columbia be reversed on the grounds urged herein, and for such further relief as to this Court may seem proper.

UTAH FUEL COMPANY, AND OTHER PETITIONERS,

By ROBERT E. QUIRK,
J. V. NORMAN,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. .....

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL.,
Petitioners,

v.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts.

The opinion of the United States Court of Appeals for the District of Columbia, filed on December 5, 1938, is printed in the record filed herewith at pages 23-28.

The opinion of this Court in *Shields, et al.* v. *Utah-Idaho Central R. Co.*, with which the opinion here is claimed to be in conflict, was also rendered December 5, 1938, and is as yet unreported.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended. (U. S. C., Title 28, sec. 348 (a).) The date of the judgment to be reviewed is December 5, 1938 (R. 29).

Statute.

The statute here involved is Bituminous Coal Act of 1937 (50 Stat. 72; U. S. C., Title 15, sec. 828-851), the pertinent provisions of which are set forth in the Appendix hereto.

Statement of the Case.

The foregoing petition for writ of certiorari contains a concise statement of the case and in the interest of brevity and to avoid repetition, such statement will not be repeated here.

Specification of Errors Intended to be Urged.

Petitioners would, upon review, contend that the United States Court of Appeals for the District of Columbia erred:

1. In holding that the District Court was without jurisdiction to enjoin the respondents from taking the action which they are threatening to take, and in failing to hold, on petition for rehearing, that its opinion was in conflict with the opinion of this Court, rendered the same day, in *Shields, et al.* v. *Utah-Idaho Central R. Co.*

2. In failing to hold that the action which respondents are threatening to take is specifically prohibited by the provisions of the Bituminous Coal Act of 1937.

Decision of Court of Appeals is in Conflict With Decision of this Court in Shields, et al. v. Utah-Idaho Central Railroad Company.

The Court of Appeals, in its opinion herein, taken in conjunction with its opinion in *Mallory Coal Co., et al.* v. *Na-*

tional Bituminous Coal Commission, 99 Fed. (2) 393, holds that as to every matter arising between an administrative agency and a person subject to its jurisdiction review must be had in the courts of appeals or in no court at all, and further holds that the petitioners have no remedy because the determination of the Commission was not a final order. It is as to these matters particularly that the petitioners contend, and in their petition for rehearing in the Court of Appeals contended, the decision of the Court below is in conflict with the decision of this Court rendered the same day, in *Shields, et al. v. Utah-Idaho Central R. Co.*

This court had already held, in *Shannahan* v. *U. S.*, 303 U. S. 596, that the determination of the Interstate Commerce Commission, there involved, was not subject to judicial review under the provisions of the Urgent Deficiencies Act. In the *Shields Case* this Court held that such a determination was subject to judicial scrutiny by a single judge District Court under the Court's general equity jurisdiction, inasmuch as the Commission's determination finally determined the rights of the complaining carrier. We here quote from the opinion of this Court in that case:

> "We have held that the determination of the Commission is not an 'order' reviewable under the Urgent Deficiencies Act of October 22, 1913. *Shannahan* v. *United States, supra.* But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the *Shannahan case*, we had no occasion there to consider. Id. at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce. * * * Equity jurisdic-

tion may be invoked when it is essential to the protection of the rights asserted. * * * (Italics ours)

Here, as there, the action sought to be enjoined is not an "order" reviewable under the statutes specifically applicable to the administrative agency whose action was sought to be enjoined. Here, as there, the equity jurisdiction invoked is essential to the protection of the rights asserted because unless that jurisdiction is exercised to protect such rights they will be absolutely destroyed. It is therefore submitted that the basis for jurisdiction in the *Shields case* cannot be distinguished from the basis for jurisdiction in the instant case.

None of the Other Reasons Given by the United States Court of Appeals for the District of Columbia for Holding the District Court Without Jurisdiction, Are Sound.

In addition to the rulings in conflict with the decision of this Court, just discussed, the Court of Appeals for the District of Columbia held that the District Court was without jurisdiction for several other reasons. These are:

First: That administrative remedies must be exhausted before judicial review can properly be given;

Second: That the order of the Commission of August 31, 1938 was a procedural order and hence not subject to judicial review; and

Third: The action of the respondents was taken as a result of the exercise of administrative discretion which had properly been confided to it by Congress, and hence that the courts are without power to control the exercise of that discretion, either by mandamus or by injunction.

None of these reasons, as we shall show, is sound when applied to the facts in the instant case.

Lower Court Erred in Holding that Legality of Commission's Action Could Be Determined on Review of Final Order Fixing Prices.

The Court of Appeals appears to have held the District Court to be without jurisdiction because petitioner had not exhausted administrative remedies although nowhere in the opinion does the Court state categorically that petitioners had not exhausted their administrative remedies. The Court seemed to be of the opinion that all questions as to the legality of the respondents' threatened action to disclose petitioners' cost reports could be raised and determined upon review of a final order of the Commission fixing prices and hence that there were further administrative remedies to exhaust.

In the first place it will appear from the record that petitioners have, in fact, exhausted all of their administrative remedies. The first threat of the Commission to take the action complained of was in the form of a ruling of March 30, 1938. The petitioner, Mallory Coal Company, and others, filed a petition in the nature of a petition for rehearing, objecting to this ruling as erroneous. The Commission overruled this petition by order of June 1, 1938, in which it directed the Secretary of the Commission to make the individual cost reports available for inspection by interested parties. Petitioners cannot conceive of any further step that could have been taken by them to persuade the Commission that its construction of the Act was erroneous.

In the second place neither can petitioners conceive of a situation wherein, upon review of a final order of the Commission fixing prices, the question of whether the Commission acted legally or illegally in disclosing their individual cost reports in the manner threatened, could be determined. Certainly petitioners could hardly be said to be aggrieved because a final price-fixing order of the Commission should appear to interested parties to be based on more extensive information than would be the case if these

individual cost reports were not disclosed. Whether they are disclosed or not, the information upon which the Commission bases its order is the same, and it is inconceivable that the illegality of the Commission's action in disclosing these reports could infect the order and render it fatally defective. In any event, at the time the Commission issues its order fixing prices, the question of whether the disclosure of the cost reports was legal or illegal would certainly have become moot inasmuch as the minute they are disclosed the damage is done and cannot possibly be repaired.

It is submitted that every case holding that before judicial review may be had of administrative action administrative remedies must be exhausted, all rights were saved for determination by the Court in the review proceeding except the alleged right to be free from the annoyance and expense of litigation, which this Court has held is no right at all. In this case secrecy of petitioners' cost reports has been specifically required by Congress, presumably on the theory that to disclose them would result in irreparable harm to producers in the coal industry. The ruling and orders of the Commission threatening to disclose these reports finally determines the rights of these petitioners under the Act of Congress, and the disclosure of such reports, in the manner threatened, would result in petitioners having no rights to save for judicial determination on final hearing.

Lower Court Erred in Holding Orders Procedural and Not Subject to Review.

With respect to the holding that the Court was without jurisdiction because orders of Commission were procedural the Court erred in three respects:

First: In assuming that by their action petitioners were seeking to have reviewed judicially any "order" of the National Bituminous Coal Commission;

Second: In holding that the order of August 31, 1938, was a preliminary procedural order; and

Third: In holding that preliminary procedural orders of administrative agencies are not subject to judicial review, when they finally determine rights and result in irreparable injury.

Petitioners' bill of complaint will demonstrate conclusively that they did not bring this action to have enjoined or set aside any order of the Commission. Their action was based on the theory that the Commission was threatening to do an act which was prohibited by the statute, that the order of August 31, 1938, as well as the ruling of March 30, 1938, were simply evidence of this threat, that if the threat were carried out they would suffer irreparable damage, and that the decision of the Court of Appeals in the *Mallory case* held that they had no remedy at law. If the Commission had been satisfied simply with its ruling of March 30th, such ruling would have constituted just as real a threat on its part as does the ruling, coupled with a series of orders telling the Secretary of the Commission how to carry out the ruling. It would seem a strange doctrine if it should be held that the availability or unavailability of equitable relief from administrative action depended on the number of documents the administrative agency issued and what it called them.

The opinion of the Court of Appeals cites *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; and *Jones* v. *Securities and Exchange Commission* (C. C. A. 2), 79 F. (2) 617, cert. denied 297 U. S. 705; in support of its contention that preliminary procedural orders of administrative agencies are not subject to judicial review. In each of those cases it will appear that the order there involved was really procedural in character. It in no sense finally determined anybody's rights. The action here, as evidenced by the ruling and the order involved in this case, on the contrary, is as final a determination of rights as a

refusal of executive clemency a minute before the condemned is scheduled to be placed in the electric chair.

Furthermore all that the cases cited hold is that preliminary procedural orders are not subject to judicial review under the usual statutory judicial review provision, found in the pertinent statute. Assuming, for a moment, that the "order" of August 31st is a preliminary procedural order, as the Court below says it is, it does not therefore follow that it is exempt from judicial scrutiny. This Court was very careful to make this clear in the *Metropolitan Edison Case, supra,* in which it said:

> "With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for *review by the Circuit Court of Appeals.*" (Italics ours.)

But this Court, in that very case, recognized that preliminary procedural orders of administrative bodies were not wholly exempt from judicial scrutiny when it reviewed and found adequate the provisions of the statute there involved with respect to judicial enforcement of administrative subpenas. And in *Myers* v. *Bethlehem Ship Building Corporation,* 303 U. S. 41, this court recognized not only the propriety of but also the need for equitable relief in the case of preliminary procedural orders which finally determine rights when it said:

> "First. There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal * * *."

Nothing in the opinion in the *Myers Case,* the *Metropolitan Edison case,* or in any other case so much as intimates that preliminary procedural orders, which finally determine rights and which to carry out would result in irreparable damage, may not be reviewed in some proceeding other than the usual one for statutory judicial review.

The Court of Appeals gives as reasons for holding preliminary procedural orders not subject to judicial review

under the usual statutory provision, the fact that every minor question which arose as to the propriety of administrative proceedings could be attacked in the courts, with the result that administrative adjudication would become virtually non-existent. Unquestionably this reason is a cogent one but certainly can have no application where a preliminary procedural order is sought to be reviewed by a court of equity under its general equity jurisdiction. Under the usual statutory provision for judicial review, an order of an administrative agency may be enjoined or set aside without any allegation of irreparable injury, and so if review can be had of a procedural order, under such a provision, it is undoubtedly true that the results prophesied by this Court might well become a reality. This certainly would not be the case, however, where jurisdiction of a court of equity is invoked, since irreparable damage has to be both alleged and proved as well as inadequacy of legal remedy.

Lower Court Erred in Holding that Issuance of Injunction Here Would Control the Exercise of Administrative Discretion.

Petitioners certainly do not question the proposition that injunctive relief will not be given where the administrative agency lawfully acts "in a matter properly within its jurisdiction." The question here, however, is whether Congress has confided to the Commission the power to construe a positive prohibition into a command to do the very thing which it prohibited. In all the cases cited by the Court of Appeals as authority for this proposition, the act of Congress clearly gave exclusive jurisdiction to the administrative or executive agency to determine, in the first instance, the matters involved. It cannot be seriously argued that by the provisions of the Bituminous Coal Act Congress intended to grant, or did grant, the Bituminous Coal Commission arbitrary power to reach any conclusion it chose in interpreting the statute. Presumably that statute, like other

statutes, is susceptible of authoritative definition. The intent of Congress, as expressed in the statute, must govern. Petitioners concede, for the purpose of this case, that Congress undoubtedly could have given the Commission the power to disclose or not to disclose the cost reports as the public interest dictated. If Congress had so provided, there is no question but what an injunction enjoining their disclosure would be one seeking to control the exercise of administrative discretion. The question here is whether there was a will to go so far, and the statute itself, the pertinent provisions of which are set forth in the petition for the writ of certiorari, gives the answer. If the Commission is permitted to put an improper construction on the statute, and in doing so utterly destroy the very rights which the statute sought to protect, and that construction is to be considered beyond the reach of the courts merely because the statute may be ambiguous, then the will of Congress is thwarted and to that extent the Commission is exercising not a delegated but a usurped authority. As was stated by the Court in *I. C. C.* v. *C. N. O. & T. P. R. Co.*, 187 U. S. 479:

> "The power given is the power to exercise and enforce, not to legislate."

The United States Court of Appeals for the District of Columbia Erred in Failing to Hold that the Threatened Action by the Commission is Specifically Prohibited by the Provisions of the Bituminous Coal Act of 1937.

The Bituminous Coal Act of 1937 provides for the promulgation of a "Bituminous Coal Code," which sets forth the rights, duties and obligations of those producers of coal who accept such Code. Section 4 of the Act provides in the first three paragraphs thereof, as follows:

> "The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code,' and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, *and the provisions of such code shall apply only to such code members,* except as otherwise provided by subsection (h) of part II of this section.

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal." (Italics ours.)

It was as members of this Code and pursuant to the terms thereof, that plaintiffs here filed the cost reports, which the Commission now threatens to make public. Under Part I, section 4—Organization—the Act provides for the organization of district boards. Part II—Marketing—of Section 4, provides in part as follows:

"The Commission shall have *power to prescribe for code members* minimum and maximum *prices,* and marketing rules and regulations, as follows:

"(a) *All code members shall report* all spot orders *to such statistical bureau* hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and *such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code members filing such information.*

"For each district there shall be established by the Commission a *statistical bureau* which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau." (Italics ours.)

It is important to notice the position in the Act of the provision imposing a confidential character upon the cost and realization reports filed by Code members with the statistical bureaus. The first sentence of Part II of Section 4 grants to the Commission power to prescribe minimum and maximum prices for Code members in the manner thereafter set out. The next sentence of Part II requires Code members to report to the proper statistical bureau *inter alia* "such other information concerning the * * * cost, sale, and distribution of coal as the Commission may authorize or require." Then immediately follows the sentence: "All such records (*i. e.*, those filed with the Statistical Bureau) shall be held by the Statistical Bureau as the confidential records of the Code member filing such information." The juxtaposition of these three sentences would seem to indicate clearly that Congress intended that, in exercising the power conferred in the first sentence to fix prices, the Commission should respect the confidential character of these reports. Otherwise, the third sentence might well have been relegated to some other section where it would not be tied up with exercise of the price-fixing powers of the Commission.

It will therefore be seen that the Code members filed the cost reports here in question pursuant to the terms of a Code which they had formerly accepted, which Code is in the terms of the statute, and provided that such reports should be held "as the confidential records of the Code member filing such information."

This feature of the Act deserves special mention. The Code is not merely one of several sections of a statute of general application. It is more than that—it is the part of the Act which relates peculiarly to Code members. It is singled out from the Act by being required, by Section 5, to be promulgated as a separate document, which is sent to all producers for signature and acknowledgment. A producer who accepts in this manner becomes a Code member. One who does not, incurs none of the liabilities of the Code

nd is not subject thereto at all. If he prefers to pay the enalty provided in Section 3, a producer can remain unffected by the Code. Hence, it is fair to say that Congress ntended that a Code member will find the rights and duties eculiar to him as a Code member set out in the document hich he signs. He finds in this document an unqualified tatement that the information he files with the statistical ureaus shall remain his confidential records. Surely, Conress cannot have intended that this unqualified statement hould be entirely emasculated by the vague and uncertain xception set out in Section 10 (a), a portion of the Act hich is not required to be brought to his special attention t all and which by its terms is applicable to producers as istinguished from Code members.

In requiring the filing of cost and realization reports, he Commission, however, purported to act under Section) (a). This section is no part of the Code and applies to producers." Section 10 (a) provides as follows:

> "The Commission may require reports from *producers* and may use such other sources of information available it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from *a producer* disclosing costs of production or sales realization shall be made public without *the* consent of *the producer* from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Italics ours.)

The Commission now claims the right to disclose the invidual cost reports made by the Code members under the ception in 10 (a), which is applicable to "producers."

Therefore the question presented is as to whether the exception in 10 (a) shall be construed to nullify the provision in Section 4, II (a), which is a part of the Code, pursuant to which Code members furnish their cost reports, and which expressly provides that such reports shall be held as their confidential property, and further whether the exception in Section 10 (a) shall be so construed as to destroy the rule to which it is an exception, as well as the general purpose running through the Act.

The duties of the Code members, with respect to the price-fixing process under the Code, are set forth in the Code and there we find no exception or qualification to the general requirement that the information filed by Code members under Section 4, II (a) shall remain their confidential property. There would be absolutely no need for this general requirement of Section 4 II (a) if Congress intended that it be qualified by the vague exception in Section 10 (a), for Section 10 (a) itself includes provisions relating to non-disclosure of cost information. When we look at Section 10 (a) we find a general power to require reports of producers, as distinguished from Code members, and it is reasonable to suppose that Congress intended this power to be used in connection with the performance by the Commission of its duties other than those set out in Section 4. This construction is further justified by the fact that the power of the Commission to require reports from producers, contained in Section 10 (a), could be excised completely from the statute without interfering in the slightest with the performance by the Commission of its duties under Section 4, that section containing complete authority and power for the Commission to gather information essential to the performance of its duties there set forth. On the other hand, the Commission would be unable to perform its other duties under these other sections without the authority contained in Section 10 (a) to require reports from producers.

Petitioners insist that among the immunities which they obtain for assuming the obligations of Code members is the immunity from the disclosure of their individual cost and realization reports; that the Code expressly so provides and the Code is in the terms of the statute. They further insist that to construe the exception contained in Section 10 (a) so as to authorize a general disclosure of these confidential reports not only violates their rights under the statute and the Code, but also violates two well established rules of construction: (a) That where possible an Act must be construed so as to give force and effect to each of its provisions and to avoid, if may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed. *Township of Montclair* v. *Ramsdell*, 107 U. S. 147; *Peck, et al.*, v. *Jennes, et al.*, 7 How. 612; and (b) "Exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy" the general policy to which it is an exception. *Spokane & Inland Empire R. Co.* v. *United States*, 241 U. S. 344. See also *U. S.* v. *Ewing*, 140 U. S. 142.

The Act sets up elaborate machinery to protect the confidential nature of the individual reports of code members. It provides for statistical bureaus to which such reports shall be made, and provides that "all such records shall be held by the statistical bureau as the confidential records of the code member filing such information." It provides that the district boards shall determine "from cost data submitted by the proper statistical bureau of the Commission" the weighted average of the total cost of the ascertainable tonnage produced in the district in the calendar year 1936, and adjust same to reflect certain changes or trends, and that "Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum price area" and that "The Commission shall thereupon determine the weighted average of the total

costs of the tonnage for each minimum price area in the calendar year 1936," and also adjusted to reflect certain changes and trends.

The Act fairly breathes secrecy with respect to the individual cost data of code members. No one is to see it except the Statistical Bureau, which shall hold it "as the confidential records of the Code member filing such information." The Act then proceeds to provide that "no producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a District Board of employee or representative thereof shall be an employee of any Statistical Bureau," thereby clearly indicating that the District Boards shall not have knowledge of the records which the Statistical Bureau is to hold as confidential.

On the other hand, the District Boards are composed of coal producers, except one member who is a representative of Labor. Why should Congress have been at pains to provide that the reports should be made to the Statistical Bureau, that such Bureau should hold them as the confidential records of the Code member, that no one connected with the coal industry shall be on the Statistical Bureau, that the District Boards should make their determination "from cost *data* submitted by the proper Statistical Bureau of the Commission," that the Commission should make its determination from the figures and computations submitted to it by the district boards, if, by the exception to the rule in Section 10 (a), the whole elaborate design to insure secrecy was to be destroyed by an order of the Commission when it came to hold hearings to establish minimum prices? Such a construction imputes to Congress either an intention to mislead and deceive or ignorance as to the meaning of the exception in Section 10 (a). Can it be that Congress intended, after setting up such elaborate machinery to protect the confidential nature of these reports of Code members, that the Commission should or could nullify the operation of such machinery and defeat the purpose thereof

by simply ordering all such reports made available for inspection?

Why should Congress have provided, as it did in Section 4 II, (a), that "weighted average figures of total cost, determined as aforesaid, shall be available to the public," if it intended that the individual returns from which such weighted average figures are computed should themselves be available for public inspection? Again, why should Congress have provided, as it did in the exception to Section 10 (a), applicable to producers "that such information may be compiled in composite form in such manner as shall not be injurious to the interest of any producer, and, as so compiled, may be published by the Commission "if it intended to give to the Commission authority to make public all the individual returns whether or not injurious to the interest of any producer? Finally, why should Congress have provided, as it did in Section 4 II (a), that the reports of code members "shall be held by the Statistical Bureau as the confidential records of the Code member filing such information "if it intended by the exception in Section 10 (a) that the Commission should make them public? In the light of all these provisions running throughout the Act, it is submitted that the construction of the exception in Section 10 (a) contended for by the respondents is absurd.

The question may be raised, under what circumstances the exception in Section 10 (a) can be applied if it does not permit the general disclosure of all individual cost reports in a hearing seeking to ascertain the weighted average cost. While we consider it is only necessary to establish that the exception is not susceptible to the construction which the Commission has placed upon it in ordering the cost returns made available for inspection, yet we point out that there are numerous instances in which the exception would nevertheless have application. Among these are: (a) On an issue of confiscation where maximum prices are prescribed (Sec. 4, Part II (c)); (b) on an issue of confiscation under minimum prices; (c) on an issue raised by a charge that the in-

dividual Code member has filed insufficient or false information, contrary to his duty as a Code member (Sec. 4, Part II (k)); in a hearing on a petition for exemption from the Code (Sec. 4-A).

It is therefore submitted that making available for inspection the individual cost and realization returns of all Code members does violence not only to the rights of Code members under the Code and to numerous specific provisions of the Act, but to the spirit and purpose which run throughout the Act; and that the Court may not, under any recognized rule or theory of construction, so construe the exception, which is ambiguous at best, as to cause this result. *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172.

Conclusion.

As already shown on motion of petitioners, the Court below entered an order December 10, 1938 which stayed its mandate until January 10, 1939, and which also provided that in order to maintain the status quo pending the application for certiorari, the injunction theretofore issued by that Court "is hereby continued in force and effect pending action by the Supreme Court, conditioned, however, upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within 10 days from the date of this order." Pursuant to the order of the Court below, a petition or motion for a stay will be filed with this Court contemporaneously with the filing of this petition for certiorari.

Without attempting to further summarize or argue the points involved, we submit that they are of such importance in protecting the rights of the citizen when threatened by action of administrative agencies, taken in the course of their proceedings, that they should be determined by this Court.

WHEREFORE, it is respectfully urged that the Court grant the writ of certiorari petitioned for herein.

Respectfully submitted,

ROBERT E. QUIRK,
J. V. NORMAN,
Counsel for Petitioners.

December 15, 1938.

Address of Counsel,
Investment Building,
Washington, D. C.

APPENDIX.

Excerpts from Bituminous Coal Act of 1937.

"SEC. 4. The provisions of *this section* shall be promulgated by the Commission as the 'Bituminous Coal Code,' and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, *and the provisions of such code shall apply only to such code members,* except as otherwise provided by subsection (h) of part II of this section.

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal." (Italics ours.)

* * * * * * * *

PART II—MARKETING.

"The Commission shall have *power to prescribe for code members* minimum and maximum *prices,* and marketing rules and regulations, as follows:

"(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. *All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.*

* * * * * * * *

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities and sizes of coal produced in said district, and classification of coal

and price variations as to mines consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, *determined as hereinafter provided,* of the tonnage of such minimum price area.

• • • • • • • • •

"As soon as possible after its creation, each district board shall determine, *from cost data submitted by the proper statistical bureau* of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until change by the Commission, for the proposal and establishment of minimum prices.

• • • • • • • • •

"(b) District boards shall, under the rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities and sizes of coal, and transpor-

tation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at point of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return, *as provided in subsection* (*a*) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of Part II of this section." (Italics ours.)

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528.

UTAH FUEL COMPANY, INDEPENDENT COAL & COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., - - - - - - Petitioners,

versus

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL., - - - - - - Respondents.

BRIEF FOR PETITIONERS.

ROBERT E. QUIRK,
J. V. NORMAN,
Attorneys for Petitioners.

December 27, 1938.

WESTERFIELD-BOHTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 528.

UTAH FUEL COMPANY, INDEPENDENT COAL & COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., - - - - - - - - *Petitioners,*

v.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL., - - - - - - - *Respondents.*

BRIEF FOR PETITIONERS.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia was rendered on December 5, 1938, and is not yet reported. It is found at pages 22 to 32 of the record. The District Court of the United States for the District of Columbia rendered no opinion, but its decree denying motion for temporary injunction and dismissing the bill of complaint is found at pages 18 and 19 of the record herein.

STATEMENT OF JURISDICTION.

This case is here on writ of certiorari to the United States Court of Appeals for the District of Columbia, granted by this Court on December 17, 1938.

THE STATUTE.

The pertinent provisions of the Bituminous Coal Act of 1937 are set forth in the discussion that follows and are also found in the Appendix hereto.

STATEMENT OF THE CASE.

This case comes to this Court on writ of certiorari to the United States Court of Appeals for the District of Columbia, to review a judgment of that Court affirming a judgment of the District Court of the United States for the District of Columbia, denying a motion for injunction and dismissing the bill of complaint. Inasmuch as defendants moved to dismiss the bill of complaint, there is no dispute as to the facts, and except as otherwise noted, the statement of the case is derived from petitioners' bill of complaint (R. 3-15). The controversy herein involves the construction of various provisions of the Bituminous Coal Act of 1937, set out below, but, as will appear from the opinion of the Court below, that court held it had no jurisdiction to decide such controversy.

The Bituminous Coal Act of 1937 created the Commission whose duty it is, among other things, to prescribe by order, after notice and hearing, minimum prices to be charged by producers of coal who are members of the Bituminous Coal Code for coal sold by them which is subject to the Code. Petitioners, are, and at all times mentioned in the bill of complaint have been, members in good standing of the Bituminous Coal Code, promulgated by the respondent Commission. The provisions of the Bituminous Coal Code are prescribed in the Act. These minimum prices are related to cost of production, and in order that the Commission may know what these costs of production are, the Act provides for the submission to the Statistical Bureaus of the Commission by Code members of data disclosing their costs and sales realization. Section 4, Part II, of the Act provides in part as follows:

> "The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:
>
> "(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confiden-

tial records of the code member filing such information."

Section 10(a) of the Act provides as follows:

"Sec. 10 (a). The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters, as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producers from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission."

On July 15, 1937, the Commission entered its Order No. 15. In that order the Commission recited that to perform effectively its duties under the National Bituminous Coal Act of 1937, it was required to be fully informed as to the production and distribution of bituminous coal, and that pursuant to the authority conferred on it by Section 10 (a) of the Act, each producer of bituminous coal, including petitioners, was directed to file with the Commission a complete report showing the detailed cost of tonnage produced and

realization prices derived from the sale of coal; that such reports were to be made separately for each mine and to include all coal produced during the calendar year 1936, and all coal sold during the same period. A copy of this order was sent by the Secretary of the Commission to each known coal producer within the United States, together with cost forms, which the Commission had provided for the making of such reports. Each producer was required by the order to file, and the petitioners did file, duly verified reports with the Statistical Bureau of the Commission for the district within which the reporting mine or mines were located. The order referred to contained the following provision:

> "The Commission directs special attention to the provisions of section 10 of said Act relating to the confidential nature of the report required under this order, and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

The cost forms prepared by the Commission accompanying the Commission's order, which were used by petitioners in submitting their detailed production costs and sales realization, bore at the top in bold type, the following statement:

> "THIS REPORT IS REQUIRED UNDER THE PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 AND IS THEREFORE CONFIDENTIAL.

Petitioners as members in good standing of the Bituminous Coal Code, and pursuant to the requirements of said order and the provision of Section 4, and relying on the confidence imposed by such provision, as well as the statement above quoted, prepared and filed with the Statistical Bureau of the Commission, for their respective districts, complete cost and realization reports for 1936 for each of their mines.

After these reports had been thus filed by petitioners, the Commission, on March 30, 1938, made and promulgated a ruling in which it announced that it would thereafter give public notice of a hearing to be held to determine the weighted average of total costs of the tonnage of coal for each minimum price area (as defined in the Act), in the calendar year 1936, adjusted as provided in Section 4, Part II, of the Act. In its ruling the Commission further announced that at such hearing the information obtained from individual coal producers with respect to individual costs of production of coal of such producers in the calendar year 1936 would be made available by the Commission for inspection and introduction in evidence for certain specified purposes, and that it construed Section 10 (a) of the Act as authorizing such a disclosure in such manner and under such circumstances.

Thereafter certain of the petitioners herein filed a petition with the Commission, which objected to the Commission's ruling of March 30, 1938, as erroneous, and which prayed, *inter alia*, for a hearing, and that upon consideration of the facts and circumstances recited in the petition and the provisions of

the Bituminous Coal Act of 1937, the Commission vacate the ruling and rescind its construction of Section 10 (a) of the Act. The Commission thereupon assigned that petition for hearing and the petitioner, Mallory Coal Company, and certain other coal producers, participated in that hearing. As a result thereof, on June 1, 1938, the Commission filed its report, findings of fact, and opinion, and made and entered an order as of that date. In that order the Commission adhered to its ruling of March 30, 1938, reciting the substance of the petitions and the evidence of injury, and thereupon denied said petitions and ordered and directed:

> "That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

The petitioner, Mallory Coal Company, and certain other coal producers, believing that the Bituminous Coal Act of 1937 properly construed prohibited the Commission from disclosing the cost and sales realization data filed by them with the Commission in the manner threatened, and being thus aggrieved by the order of the Commission of June 1, 1938, filed a petition for review by the United States Court of Appeals for the District of Columbia, pursuant to the provisions of Section 6 (b) of the Act. That petition was

heard and considered by that Court, and on August 1, 1938, in No. 7178, *Mallory Coal Co., et al.*, v. *National Bituminous Coal Commission,* 99 Fed. (2d) 399, the Court dismissed the petition on the ground, *inter alia,* that the order entered by the Commission was not a reviewable order under the provisions of Section 6 (b).

On August 31, 1938, the Commission made and entered orders directing the Secretary of the Commission to cause the verified cost reports of all the individual producers in the various districts, including petitioners, "to be made available for inspection during business hours," on and after certain dates named in the order, by those interested parties who had filed appearances in the proceeding before the Commission.

Still believing that the Act properly construed prohibited the Commission from disclosing their cost and sales realization data in the manner threatened, having no remedy at law or by way of review, and being threatened with action which would subject them to irreparable injury, the petitioner, Mallory Coal Co., as well as these other petitioners, September 7, 1938, instituted this action in the District Court of the United States for the District of Columbia, to enjoin the Commission from making the threatened disclosure, and praying for a declaratory judgment. The District Court filed no opinion, but in its order dismissing the bill of complaint and denying the motion for a temporary injunction (R. 18), stated that the acts sought to be enjoined were authorized by and not in violation

of the Bituminous Coal Act of 1937. On application of petitioners to the United States Court of Appeals for the District of Columbia, an injunction pending appeal was granted (R. 33), whereby the defendants were enjoined "from making available for inspection by interested parties, or others, the individual verified cost reports of the petitioners, as described in the bill of complaint and in the orders of the National Bituminous Coal Commission, promulgated August 31, 1938, in Docket 15 of said Commission." Thereafter on December 5, 1938, in No. 7247, *Utah Fuel Co., et al.*, v. *National Bituminous Coal Commission, et al.*, the United States Court of Appeals for the District of Columbia affirmed the judgment of the lower court dismissing the bill and denying the motion for injunction, on the ground, as appears from the opinion of that Court filed herewith as a part of the record, that the District Court did not have jurisdiction either under its general equity jurisdiction or under the Declaratory Judgments Act, to determine the legality of the Commission's threatened action (R. 22-32).

On December 8th petitioners filed with the United States Court of Appeals for the District of Columbia their petition for rehearing, wherein, among other things, they called the Court's attention to the apparent conflict between its decision and the decision of this Court in the case of *Shields, et al.*, v. *Utah Idaho Central R. Co.*, as hereinafter set forth. At the same time petitioners filed with said Court a motion for stay pending disposition of the petition for rehearing

and, in the event it be denied, pending action by this Court.

On December 10, 1938, the Court of Appeals for the District of Columbia entered its order denying petition for rehearing, staying its mandate until the 10th of January, 1939, and continuing the injunction theretofore granted by it, pending application for writ of certiorari and stay order to this Court within 10 days (R. 33).

Thereafter, on December 16, 1938, the petitioners filed their petition for writ of certiorari with this Court, together with motion for an injunction, and on December 17, 1938, this Court entered its order granting the petition for writ of certiorari, assigning the case for argument on Tuesday, January 3, 1939, and granting an injunction to maintain the *status quo* pending final disposition of the case by this Court.

STATEMENT OF FACTS.

There is no dispute as to the facts since they are stated in the bill of complaint (R. 3) and are admitted by the motion to dismiss (R. 16). These facts have been sufficiently stated in the "Statement of the Case" and will not here be repeated.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

In the brief of petitioners in support of the application for writ of certiorari there is set out, as required by the rules, a specification of errors intended

to be urged if a review be granted. The specification is as follows:

Petitioners would, upon review, contend that the United States Court of Appeals for the District of Columbia erred:

1. In holding that the District Court was without jurisdiction to enjoin the respondents from taking the action which they are threatening to take, and in failing to hold, on petition for rehearing, that its opinion was in conflict with the opinion of this Court, rendered the same day, in *Shields, et al.*, v. *Utah-Idaho Central R. Co.*

2. In failing to hold that the action which respondents are threatening to take is specifically prohibited by the provisions of the Bituminous Coal Act of 1937.

SUMMARY OF ARGUMENT.

1. The District Court has jurisdiction to grant the relief sought and the complaint states facts sufficient to constitute a cause of action. All the requisites of equitable jurisdiction are present. The plaintiffs are being: (1) threatened by officers of the United States with immediate unlawful action; (2) which would inflict irreparable injury; and (3) have no adequate remedy at law. All of these matters are alleged in the bill of complaint and the same states a cause of action. On the pleadings, the allegations of fact contained in the bill must be taken as true.

2. The exception in Section 10 (a) of the Bituminous Coal Act of 1937 cannot be construed to give to the Commission authority to make public at a hearing to establish minimum prices, the individual cost reports of Code members made by them pursuant to the terms of the statute and the Code in the manner proposed, without nullifying the provisions of the Act which provide that such information shall be held as the confidential records of the Code member filing same, and specifically without nullifying the unqualified rule in Section 4 II (a), and the rule in Section 10 (a) to which the exception is made. Taken by its four corners, the Act cannot be construed to permit the publication of these reports under the circumstances and in the manner here proposed without destroying the general policy and purpose which runs throughout the Act, and without imputing to Congress either an intent to mislead and deceive or ignorance of the meaning of the language used in the exception.

3. Respondents contend that the Court should resolve all doubts of construction in favor of avoiding any question as to the constitutionality of the proceedings by the Commission under the Act. In answer to this contention petitioners say that the meaning of the Act is clear, and that the Court may not ignore the plain terms and meaning of the Act in order to avoid a possible question of constitutionality, and that to construe the Act as requested by the defendants would be for the Court to indulge in "disingenuous evasion."

4. While the question whether the interested parties would be denied a fair hearing necessary under

the requirement of due process if the individual cost data be not disclosed, is not here and not necessary for the decision of this case, petitioners contend that if considered it must be answered in the negative.

5. If the underlying data on which are based statistics used in carrying out the provisions of an Act of Congress must be disclosed and made subject to verification, not only would the Act here in question be unworkable, but the same would be true as to numerous other Acts of Congress, if, indeed, such other Acts would not be unconstitutional on their face. Among the other Acts to which reference is made as coming within this rule are the Agricultural Adjustment Act of 1938 and the Fair Labor Standards Act of 1938.

ARGUMENT.

The District Court Had Jurisdiction of This Cause and to Grant the Relief Sought.

The Court of Appeals for the District of Columbia held that the District Court was without jurisdiction and affirmed the judgment of that Court dismissing the bill of complaint.

That this ruling was in error we think is established by numerous decisions of this Court and particularly the decision in *Shields, et al.*, v. *Utah-Idaho Central R. Co.*, decided December 5th, and not yet reported. The opinion of the Court of Appeals herein, taken in conjunction with its opinion in *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 Fed.

(2d) 399, holds that as to every matter arising from an action of an administrative agency, review must be had in the Court of Appeals, or in no court at all, and further holds that the petitioners have no remedy because the determination of the Commission was not a final order.

This Court had already held, in *Shannahan* v. *U. S.*, 303 U. S. 596, 82 L. Ed. 740, 58 Sup. Ct. Rep. 732, that the determination of the Interstate Commerce Commission, there involved, was not subject to judicial review under the provisions of the Urgent Deficiencies Act. In the *Shields case* this Court held that such a determination was subject to judicial scrutiny by a single judge District Court under the Court's general equity jurisdiction, inasmuch as the Commission's determination finally determined the rights of the complaining carrier. We here quote from the opinion of this Court in that case:

> "We have held that the determination of the Commission is not an 'order' reviewable under the Urgent Deficiencies Act of October 22, 1913. *Shannahan* v. *United States, supra.* But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the *Shannahan case,* we had no occasion there to consider. *Id.* at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less

a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce. * * * Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted. * * *" (Italics ours.)

Here, as there, the action sought to be enjoined is not an "order" reviewable under the statutes specifically applicable to the administrative agency whose action was sought to be enjoined. Here, as there, the equity jurisdiction invoked is essential to the protection of the rights asserted because unless that jurisdiction is exercised to protect such rights they will be absolutely destroyed. It is therefore submitted that the basis for jurisdiction in the *Shields case* cannot be distinguished from the basis for jurisdiction in the instant case.

Section 24 (8), as amended, of the Judicial Code (U. S. C., Title 18, Sec. 41 (8)) provides as follows:

"Sec. 24. The district courts shall have original jurisdiction as follows:

* * * * * * *

"(8) Eighth, of all suits and proceedings arising under any law regulating commerce."

Section 41, as amended, of title 18 of the Code of the District of Columbia provides as follows:

"Section 41. * * * The district court of the United States for the District of Columbia shall have general jurisdiction in law and equity * * *."

Hence it seems clear that if other bases for equitable jurisdiction are present, the District Court had jurisdiction to grant the relief prayed.

The facts herein present a classical case of equitable jurisdiction, as well as a compelling occasion for its exercise. (1) Public officials, acting under color of authority, (2) are threatening to take action which will subject petitioners to irreparable injury, (3) which petitioners assert is unlawful and (4) for the redress of which they have no adequate remedy at law. *Ex Parte Young,* 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441. In addition, inasmuch as Section 4, Part II (a), of the Bituminous Coal Act of 1937 provides that the costs and sales realization reports of petitioners must be held by the various statistical bureaus as petitioners' confidential records, and inasmuch as petitioners submitted such reports to such statistical bureaus in confidence (R. 11), relying on these provisions as well as on the order of the Commission directing their submission and the forms on which such reports were required to be made (R. 10), there is thus presented a situation strikingly similar to one involving a trade secret wherein equity jurisdiction is invoked to prevent a breach of trust. Data such as that here involved has been held by this Court to be governed by the principles applicable to trade secrets and thus entitled to the protection of a court of equity.

Board of Trade v. *Christie Grain & E. Co.*, 198 U. S. 236, 49 L. Ed. 1036, 25 Sup. Ct. Rep. 637.

The Threat.

Respondents, purporting to act pursuant to an alleged authority contained in the Bituminous Coal Act of 1937, are threatening to disclose petitioners' records, showing in detail their costs of production and sales realization on bituminous coal produced and sold by them. This threat is evidenced by the ruling of the Commission of March 30, 1938 (R. 6), and by its order of June 1, 1938 (R. 6), and its orders of August 31, 1938 (R. 7, 8), directing the Secretary of the Commission as to the manner in which he is to carry out the ruling. That this threat is sufficient seems clear. *Ex Parte Young, supra, Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. Rep. 340.

The Irreparable Injury.

Although respondents in their motion to dismiss the complaint attack the allegations in the bill with respect to irreparable injury (R. 16), they by that motion admit all facts well pleaded, and as a result of those admissions it seems clear on this record that irreparable injury will result to petitioners if their cost and sales realization reports are disclosed in the manner threatened. That such reports constitute valuable property is not open to question. *Board of Trade* v. *Christie Grain & E. Co., supra.* See *International*

News Service v. *Associated Press*, 248 U. S. 215, 63 L. Ed. 211, 39 Sup. Ct. Rep. 68. The very fact that disclosure will result in such reports coming into the hands of those not entitled to see them, thus destroying petitioners' property in them, constitutes irreparable injury. *Board of Trade* v. *Christie Grain & E. Co., supra.*

Respondents, in paragraph 4 of their motion to dismiss the complaint (R. 16), make an indefensible assertion that petitioners are unable to show irreparable injury unless they allege whether they are high cost producers or low cost producers. The bill of complaint will show that whether they are the one or the other irreparable injury will be done to them if their cost reports are made public. This assertion of respondents comes down to the proposition that before petitioners are entitled to equitable relief they much disclose to the world the very matter as to the secrecy of which thy are praying this Court for protection. The mere statement of this proposition carries its own refutation.

Inadequacy of Remedy at Law.

The U. S. Court of Appeals for the District of Columbia in the previous aspect of this controversy, *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 Fed. (2d) 399, has already held that the usual remedy at law, namely a suit in that court or a Circuit Court of Appeals pursuant to the judicial review provisions of the Act, was not available to petitioners, and petitioners cannot conceive of any other remedy at law which they might have invoked. Surely

petitioners could not have refused to submit their cost and sales realization data to the Statistical Bureau of the Commission and escaped the penalties for such refusal in a suit brought for their collection by a defense that after the Commission acquired this data, which petitioners concede it had authority to do under Section 4 II (a) of the statute, it intended to use such data in a manner forbidden by the statute. See *First National Bank* v. *Albright*, 208 U. S. 548, 52 L. Ed. 614, 22 S. Ct. Rep. 349. Even assuming that such a defense would have been valid, it could hardly be said to have been available to petitioners at the time their cost and sales realization reports were required to be submitted to the statistical bureau, for the first intimation petitioners had that the Commission intended to treat these reports otherwise than as confidential, did not come until almost nine months after they had turned these reports over to the Commission pursuant to its order (R. 5, 9, 10), and they certainly could not reasonably have been required to have anticipated the Commission's ruling in this respect, especially in view of the assuring statement in bold type appearing on the cost forms on which the required data was to be submitted.

The unavailability of the statutory judicial review under the Urgent Deficiencies Act was the very reason that the Circuit Court of Appeals, in *Shields* v. *Utah Idaho C. R. Co.*, 95 Fed. (2d) 911, held that there was no adequate remedy at law and hence that the District Court had jurisdiction to grant the injunction prayed for. The same reason is implicit in the decision of this court in that same case, *Shields, et al.*, v. *Utah*

Idaho C. Ry. Co., decided December 5, 1938. See also *Hudson & Manhattan Ry. Co.* v. *Hardy* (S. D. N. Y), 22 Fed. Supp. 105.

Although Not Required So To Do Petitioners Have Exhausted Their Remedies Before the Administrative Agency and Their Rights Will Be Destroyed if Determination Thereof Can Only Be Had on Review of a Final Order Fixing Prices.

In a case such as this, where the administrative agency has exceeded its statutory powers, it was not necessary for petitioners to seek redress in a proceeding before the Commission. It was expressly so held in *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557, 63 L. Ed. 772, 39 Sup. Ct. Rep. 375, where the Court said (563):

> "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 49, 56 L. Ed. 83, 88, 32 Sup. Ct. Rep. 22; Louisiana & P. R. Co. v. United States, 209 Fed. 244, 251; Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 Fed. 449, 451. The Sacramento Case (United States v. Merchants & Mfrs. Traffic Asso. 242 U. S. 178, 61 L. Ed. 233, 37 Sup. Ct. Rep. 24) was a case of this character. Compare Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 92,

57 L. Ed. 431, 433, 33 Sup. Ct. Rep. 185; Southern P. Co v. Interstate Commerce Commission, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 298. The district court properly assumed jurisdiction of this suit."

But the record discloses that petitioners have, in fact, exhausted their administrative remedies. The first threat of the Commission to take the action complained of was in the form of a ruling of March 30, 1938 (R. 5). The petitioner, Mallory Coal Company, and others, filed a petition in the nature of a petition for rehearing, objecting to this ruling as erroneous (R. 6). The Commission, after hearing, overruled this petition by order of June 1, 1938, in which it directed the Secretary of the Commission to make the individual cost reports available for inspection by interested parties (R. 6). Petitioners cannot conceive of any further step that could have been taken by them to persuade the Commission that its construction of the Act was erroneous.

Neither can petitioners conceive of a situation wherein, upon review of a final order of the Commission fixing prices, the question of whether the Commission acted legally or illegally in disclosing their individual cost reports in the manner threatened, could be determined. Certainly petitioners could hardly be said to be aggrieved because a final price-fixing order of the Commission should appear to interested parties to be based on more extensive information than would be the case if these individual cost reports were not disclosed. Whether they are disclosed or not, the in-

formation upon which the Commission bases its order is the same, and it is inconceivable that the illegality of the Commission's action in disclosing these reports could infect the order and render it fatally defective. In any event, at the time the Commission issues its order fixing prices, the question of whether the disclosure of the cost reports was legal or illegal would certainly have become moot inasmuch as the minute they are disclosed the damage is done and cannot possibly be repaired.

It is submitted that in every case holding that before judicial review may be had of administrative action administrative remedies must be exhausted, all rights were saved for determination by the Court in the review proceeding except the alleged right to be free from the annoyance and expense of litigation, which this Court has held is no right at all. In this case secrecy of petitioners' cost reports had been specifically required by Congress, presumably on the theory that to disclose them would result in irreparable harm to producers in the coal industry. The ruling and orders of the Commission threatening to disclose these reports if carried out finally determines the rights of these petitioners, and the disclosure of such reports, in the manner threatened, would result in petitioners having no rights to save for judicial determination on final hearing.

Petitioners Are Not Seeking to Review Any "Order" of the Commission and the Threatened Invasion of Petitioners' Rights Is Not a Procedural Matter.

Petitioners' bill of complaint will demonstrate conclusively that they did not bring this action to have enjoined or set aside any order of the Commission. Their action was based on the theory that the Commission was threatening to do an act which was prohibited by the statute, that the order of August 31, 1938, as well as the ruling of March 30, 1938, were simply evidence of this threat, that if the threat were carried out they would suffer irreparable damage, and that the decision of the Court of Appeals in the *Mallory case, supra,* held that they had no remedy at law. If the Commission had been satisfied simply with its ruling of March 30th, such ruling would have constituted just as real a threat on its part as does the ruling, coupled with a series of orders telling the Secretary of the Commission how to carry out the ruling. It would seem a strange doctrine if it should be held that the availability or unavailability of equitable relief from administrative action depended on the number of documents the administrative agency issued and what it called them.

The opinion of the Court of Appeals cites *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 82 L. Ed. 948, 58 Sup. Ct. Rep. 963; *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 61 L. Ed. 1007, 37 Sup. Ct. Rep. 584; and *Jones* v. *Securities and Exchange Commission* (C. C. A. 2), 79 F. (2d)

617, cert. denied 297 U. S. 705; in support of its contention that preliminary procedural orders of administrative agencies are not subject to judicial review. In each of those cases it will appear that the order there involved was really procedural in character. It in no sense finally determined anybody's rights. The action here, as evidenced by the ruling and the order involved in this case, on the contrary, is as final a determination of rights as a refusal of executive clemency a minute before the condemned is scheduled to be placed in the electric chair.

Furthermore, all that the cases cited hold is that preliminary procedural orders are not subject to judicial review under the usual statutory judicial review provision, found in the pertinent statute. Assuming, for a moment, that the "order" of August 31st is a preliminary procedural order, as the Court below says it is, it does not therefore follow that it is exempt from judicial scrutiny. This Court was very careful to make this clear in the *Metropolitan Edison case, supra,* in which it said:

> "With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for *review by the Circuit Court of Appeals.*" (Italics ours.)

But this Court, in that very case, recognized that preliminary procedural orders of administrative bodies were not wholly exempt from judicial scrutiny when it reviewed and found adequate the provisions of the

statute there involved with respect to judicial enforcement of administrative subpoenas. And in *Myers* v. *Bethlehem Ship Building Corporation,* 303 U. S. 41, 82 L. Ed. 399, 58 Sup. Ct. Rep. 26, this Court recognized not only the propriety of but also the need for equitable relief in the case of preliminary procedural orders which finally determine rights when it said:

> "First. There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal. * * *"

Nothing in the opinion in the *Myers case,* the *Metropolitan Edison case,* or in any other case so much as intimates that preliminary procedural orders, which finally determine rights and which to carry out would result in irreparable damage, may not be reviewed in some proceeding other than the usual one for statutory judicial review.

The Court of Appeals gives as reason for holding preliminary procedural orders not subject to judicial review under the usual statutory provision, the fact that every minor question which arose as to the propriety of administrative proceedings could be attacked in the courts, with the result that administrative adjudication would become virtually non-existent. Unquestionably this reason is a cogent one, but certainly can have no application where a preliminary procedural order is sought to be reviewed by a court of equity under its general equity jurisdiction. Under the usual statutory provision for judicial review, an

order of an administrative agency may be enjoined or set aside without any allegation of irreparable injury, and so if review can be had of a procedural order, under such a provision, it is undoubtedly true that the results prophesied by this Court might well become a reality. This certainly would not be the case, however, where jurisdiction of a court of equity is invoked, since irreparable damage as a result of unlawful action has to be both alleged and proved as well as inadequacy of legal remedy.

The Granting of Injunction Here Would Not Control the Exercise of Administrative Discretion and the Court Will Determine Whether the Statute Properly Construed Prohibits the Action Sought to be Enjoined.

The Court of Appeals for the District of Columbia held that the action sought to be enjoined involved a judgment based upon the exercise of discretion by an administrative agency in a matter properly within its jurisdiction, and that the statute being ambiguous, and the construction placed thereupon by the Commission being a possible one, injunctive relief is not a proper remedy at this time, although the question may be properly reviewed and determined on appeal from a final order.

As has already been pointed out and as is apparent on the face of the pleadings, a review and determination of the question as to the right to make public petitioners' cost and realization reports on appeal from a final order fixing prices, would be too late to protect petitioners' rights.

Petitioners also insist that the Act is not ambiguous, but that, as we hereafter show, when all of its provisions are considered, together with its legislative history, the will of Congress to preserve the secrecy of the cost and realization reports involved becomes beyond peradventure clear.

Petitioners certainly do not question the proposition that injunctive relief will not be given where the administrative agency lawfully acts "in a matter properly within its jurisdiction." It is insisted here, however, that the Bituminous Coal Commission, assuming to act under warrant of the statute, is transcending its bounds and unlawfully exercising the power of government against petitioners in a manner that invades their rights to private property. The holding of the Court in *Philadelphia Co.* v. *Stimson, supra,* is therefore directly applicable here. There the Court, after holding that where an officer, proceeding under an unconstitutional act to the irreparable loss of the complainant may be enjoined, further held:

> "And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its power and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

Nor do any of the cases cited by the lower Court sustain its holding that in such a case as this, the statute being ambiguous, and the construction placed

thereon by the Commission being a possible one, injunctive relief at this time is not a proper remedy in any event.

The first case cited by the lower court is that of *U. S. Ex Rel. Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 47 L. Ed. 1074, 23 Sup. Ct. Rep. 698. That case involved an application for writ of mandamus against the Secretary of the Interior to compel him to vacate his decision rejecting an application for selection of public land. The Court held that the question decided by the Secretary was one within his jurisdiction and that Congress, having constituted the Land Department a special tribunal with judicial functions and with power to decide such questions, the writ of mandamus would not lie since mandamus will not be used to control the exercise of administrative or judicial discretion.

The case of *Louisiana* v. *McAdoo,* 234 U. S. 627, 58 L. Ed. 1506, 34 Sup. Ct. Rep. 938, the next case cited by the lower Court, involved an application of the State of Louisiana to the Supreme Court for permission to file a petition against the Secretary of the Treasury, requiring him to change a ruling as to the tariff to be collected on sugar. The Court held that the duties imposed upon the Secretary "are executive, and involve the exercise of judgment and discretion," and that under these circumstances the Court would not control the exercise of such judgment and discretion because "interference in such a case would be to interfere with the ordinary functions of Government."

The next case cited is *New Orleans* v. *Paine,* 147 U. S. 261, 37 L. Ed. 162, 13 Sup. Ct. Rep. 303, which was a suit brought by the City of New Orleans against the Deputy Surveyor General of the United States, to enjoin him from dividing into sections land alleged to belong to the plaintiff under prior grants. This case therefore also involved the control by the courts of a construction of the exercise by the Land Department of its powers and duties under the statute. However, there had been no final determination by the Land Department and the Court held:

> "The judicial power will not interpose by mandamus or injunction to limit or direct the action of departmental official in respect to pending matters within their jurisdiction and control."

The lower court also cites *Wilbur* v. *U. S. Ex Rel. Kadrie,* 281 U. S. 206, 74 L. Ed. 809, 50 Sup. Ct. Rep. 320. This case involved an application for mandamus to control the decision of the Secretary of the Interior revoking a decision of a predecessor in office as to the right of certain persons to share in the distribution of tribal funds. The Court held that if the Secretary of the Interior in 1927 was without power to reconsider and revoke the decision of his predecessor in 1919, the relators would be entitled to relief by mandamus but that here the authority was neither exhausted nor terminated because it was a continuing authority. The Court said:

> "The duties of executive officers, such as the Secretary of the Interior, usually are connected

with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

It will be seen that the Court has consistently held that it will not control the action of executive officers by mandamus where the authority of such officer is not free from doubt. On the contrary, however, the Court has always held, as in *Philadelphia Co.* v. *Stimson, supra,* that where an officer or administrative agency is alleged to have transcended the bounds of statutory authority and unlawfully invaded the rights of private property of the plaintiff, equity has jurisdiction to enjoin, and in such action the Court will determine for itself the proper construction of the Act.

The case of *U. S. Ex Rel Chicago Great Western* v. *I. C. C.,* 294 U. S. 50, 79 L. Ed. 752, 55 Sup. Ct. Rep. 326, which is the last decision of this Court cited by the lower court, makes clear the distinction for which we

here contend and instead of supporting the holding of the lower court that in a case such as this, the statute being thought to be ambiguous, and the construction placed thereon by the Commission being a possible one, injunctive relief will be denied, does, in fact, support our position. In that case the Interstate Commerce Commission had declined to take jurisdiction and suit was brought for writ of mandamus requiring it to take jurisdiction. The Court there said:

> "The ultimate question, then, upon the answer to which the decision of this case must turn, is whether, in holding that the statute granted it no authority to act in the premises, the Commission was so plainly and palpably wrong as matter of law that the writ should issue. It is to be noted that the solution of this question does not depend upon whether in a proper case this court would reach the same conclusion as that of the Commission. If that body had taken jurisdiction and granted relief a remedy would have been available to the respondents by the filing of a bill in equity to set aside the order and to enjoin its enforcement. Had the matter been thus presented it would have been incumbent upon the courts, however doubtful the question, to decide it. But the order here made was negative in form and substance,—the refusal of relief,—and the remedy by suit in equity was therefore not available to the petitioners."

It will be seen that this Court there holds, as it had in the cases just reviewed, that it would not by mandamus require the Commission to act when it had de-

clined to do so unless the Commission was "plainly and palpably wrong as a matter of law," but that the Court further held that if the Commission had taken action not only would a remedy be available to the plaintiffs by bill in equity to enjoin such action, but that "had the matter been thus presented it would have been incumbent upon the courts, *however doubtful the question,* to decide it." (Italics ours.)

Certainly this Court has always held that where an officer or agency of government has taken or threatened final action which will result in irreparable injury to the citizen, the Court in a proper proceeding will determine whether the officer or agency is acting within the power conferred or is transcending that power and unlawfully assuming the exercise of the power of government against the citizen, *American School of Magnetic Healing* v. *McAnulty,* 187 U. S. 194, 47 L. Ed. 90, 23 Sup. Ct. Rep. 33; *Ex Parte Young, supra; Philadelphia Co.* v. *Stimson, supra; Waite* v. *Macy,* 246 U. S. 606, 62 L. Ed. 892, 38 Sup. Ct. Rep. 395; *Shields, et al.,* v. *Utah-Idaho Central Ry. Co., supra.* Nothing in the cases relied upon by the lower court sustain a different conclusion. All of them can be distinguished either on the ground that the action was not final or that there was no invasion of rights but rather a withholding of a privilege, or that the officer or agency was exercising a discretion or judgment granted by the statute.

In *Waite* v. *Macy, supra,* this Court sustained an injunction against a Board of Import Appraisers, en-

joining them from applying certain tests which resulted in the exclusion from importation of tea containing coloring matter. It was contended that the coloring matter violated the standards "of purity, quality and fitness for consumption," provided by the statute, and that whether or not it did so violate such standards was a question for determination by the Board, and this Court said:

> "No doubt it is true that this court cannot displace the judgment of the Board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption. Morrill v. Jones, 106 U. S. 466, 27 L. Ed. 267, 11 Sup. Ct. Rep. 423; United States v. United Verde Cooper Co., 196 U. S. 207, 215, 49 L. Ed. 449, 452, 25 Sup. Ct. Rep. 222; United States v. George, 228 U. S. 14, 21, 57 L. Ed. 712, 715, 33 Sup. Ct. Rep. 412."

In asserting the right to control the action by injunction, the Court in conclusion said:

> "The Secretary and the board must keep within the statute (Merritt v. Welsh, 104 U. S. 694, 26 L. Ed. 896), which goes to their jurisdiction (see Interstate Commerce Commission v. Northern P. R. Co., 216 U. S. 538, 544, 54 L. Ed. 608, 609, 30 Sup. Ct. Rep. 417), and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. Ed. 538, 34 Sup. Ct. Rep. 283;

Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 58 L. Ed. 570, 576, 32 Sup. Ct. Rep. 340; Santa Fe P. R. Co. v. Lane, 244 U. S. 492, 61 L. Ed. 1275, 37 Sup. Ct. Rep. 714. We are satisfied that no other remedy, if there is any other, will secure the plaintiffs' rights."

The case at bar is on all fours with the foregoing case. Here, as there, the agency sought to be enjoined claims to act pursuant to the statute and claims the right to interpret the statute so as to give it the power sought to be exercised, but here, as there, the claim is made that the statute, properly construed, does not give the power to take the action sought to be enjoined, but such action constitutes a usurpation of power to the injury of the complaining party.

It cannot be seriously argued that by the provisions of the Bituminous Coal Act Congress intended to grant, or did grant, the Bituminous Coal Commission arbitrary power to reach any conclusion it chose in interpreting the statute. Presumably the statute, like other statutes, is susceptible of authoritative definition. If not, then it is void for want of certainty. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 517, 41 Sup. Ct. Rep. 298. The intent of Congress, as expressed in the statute, must govern. Petitioners concede, for the purpose of this case, that Congress could have given the Commission the power to disclose or not to disclose the cost reports as the public interest dictated. If Congress had so provided, there is no question but what an injunction enjoining their disclosure would be one seeking to control the exercise of adminis-

trative discretion. The question here is whether there was a will to go so far, and the statute itself, the pertinent provisions of which are set forth herein, gives the answer. If the Commission is permitted to put an improper construction on the statute, and in doing so utterly to destroy the very rights which the statute sought to protect, and that construction is to be considered beyond the reach of the courts merely because the statute may require construction, then the will of Congress is thwarted and to that extent the Commission is exercising not a delegated but a usurped authority. As was stated by this Court in *I. C. C.* v. *C. N. O. & T. P. R. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896:

> "The power given is the power to exercise and enforce, not to legislate."

Under No Circumstances Can Act Be Said to Authorize Disclosure, in Wholesale Manner Proposed, of Code Members' Cost Reports in the Course of Proceedings to Fix Prices.

The Bituminous Coal Act of 1937 provides for the promulgation of a "Bituminous Coal Code," which sets forth the rights, duties and obligations of those producers of coal who accept such Code. Section 4 of the Act provides in the first three paragraphs thereof, as follows:

> "The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code,' and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, *and the provisions of such code shall apply only to such code members,* except as otherwise provided by subsection (h) of part II of this section.

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal *and which shall be applicable only to matters and transactions in or directly affecting interstate commerce* in bituminous coal." (Italics ours.)

It was as members of this Code and pursuant to the terms thereof, that petitioners here filed the cost reports, which the Commission now threatens to make public. Under Part 1, Section 4—Organization—the Act provides for the organization of district boards. Part II—Marketing—of Section 4, provides as follows:

"The Commission shall have *power to prescribe for code members* minimum and maximum *prices,* and marketing rules and regulations, as follows:

"(a) *All code members shall report* all spot orders *to such statistical bureau* hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and *such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require.*

All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

"For each district there shall be established by the Commission a *statistical bureau* which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. *No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.*

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market, areas, values as to uses and seasonable demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, *determined as hereinafter provided,* of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and

all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration." (Italics ours.)

It is important to notice the position in the Act of the provision imposing a confidential character upon the cost and realization records filed by Code members with the Statistical Bureaus. The first sentence of Part II of Section 4 grants to the Commission power to prescribe minimum and maximum prices for Code members in the manner thereafter set out. The next sentence of Part II requires Code members to report to the proper Statistical Bureau *inter alia* "such other information concerning the * * * cost, sale, and distribution of coal as the Commission may authorize or require." Then immediately follows the sentence: "All such records (*i. e.,* those filed with the Statistical Bureau) shall be held by the Statistical Bureau as the confidential records of the Code member filing such information." The juxtaposition of these three sentences would seem to indicate clearly that Congress intended that, in exercising the power conferred in the first sentence to fix prices, the Commission should respect the confidential character of these reports. Otherwise, the third sentence might well have been relegated to some other section where it would not be tied up with exercise of the price-fixing powers of the Commission.

It will therefore be seen that the Code members filed the cost reports here in question pursuant to the

terms of a Code which they had formally accepted, which Code is in the terms of the statute, and provided that such reports should be held "as the confidential records of the Code member filing such information."

This feature of the Act deserves special mention. The Code is not merely one of several sections of a statute of general application. It is more than that —it is the part of the Act which relates peculiarly to Code members. It is singled out from the Act by being required, by Section 5, to be promulgated as a separate document, which is sent to all producers for signature and acknowledgment. A producer who accepts in this manner becomes a Code member. One who does not, incurs none of the liabilities of the Code and is not subject thereto at all. If he prefers to pay the tax provided in Section 3 (b), a producer can remain unaffected by the Code. Hence, it is fair to say that Congress intended that a Code member will find the rights and duties peculiar to him as a Code member set out in the document which he signs. He finds in this document an unqualified statement that the information he files with the Statistical Bureaus to enable the Commission to carry out its price-fixing duties shall remain his confidential records. Surely, Congress cannot have intended that this unqualified statement should be entirely emasculated by the vague and uncertain exception set out in Section 10 (a), a portion of the Act which is not required to be brought to his special attention at all and which by its terms

is applicable to producers as distinguished from Code members.

Exception in Section 10 (a) Does Not Authorize Wholesale Disclosure of Cost Reports in Course of Proceedings to Fix Prices.

We wish to make it clear at this point that petitioners do not contend that there are no circumstances under which their cost reports, filed with the Statistical Bureaus under Section 4 II (a), may be disclosed pursuant to the exception in Section 10 (a). We do contend that in the course of the price-fixing process the whole scheme of the Act indicates beyond peradventure of doubt that they are not to be disclosed, and never in the wholesale manner here proposed.

The question may be raised, under what circumstances the exception in Section 10 (a) can be applied if it does not permit the general disclosure of the individual cost reports in a hearing seeking to ascertain the weighted average cost used as a basis for fixing minimum prices. While we consider it necessary only to establish that the exception is not susceptible to the construction which the Commission has put upon it in ordering the cost returns made available for inspection, yet we point out that there are numerous instances in which the exception will nevertheless have application, but before proceeding to discuss these instances it would seem desirable to discuss what was intended by Congress when it wrote the exception in Section 10 (a).

Inasmuch as the question involved is not entirely free from doubt, undoubtedly this Court may resort to statutes in *pari materia* as an aid to construction. *Vane* v. *Newcombe*, 132 U. S. 220, 33 L. Ed. 310, 10 Sup. Ct. Rep. 60.

The Bituminous Coal Act of 1937 was enacted as a substitute for the Bituminous Coal Conservation Act of 1935 (49 Stat. 991) and many of the sections of the two acts are substantially identical. In the 1935 Act the exception in Section 10 (a) reads as follows:

> "Except where such disclosure is warranted by a controversy with the producer over any order of the Commission * * *."

In the 1937 Act this exception was changed to read as follows:

> "Except where such disclosure is made in evidence in any hearing before the Commission or any court * * *."

The congressional proceedings throw no light on why this change was made. It is important to note that under the 1935 Act disclosure could be made in connection with a controversy with a producer only after the Commission had issued an order. Obviously this exception was entirely too limited because there might be any number of occasions where a controversy with a particular producer would arise in the course of proceedings before the Commission prior to the time the Commission issued any order. This would be true, for example, where the Commission had charged a producer with filing a false report. Hence it seems reasonable to

conclude that the change made in the exception by the 1937 Act was made simply for the purpose of authorizing disclosure of a cost report of a particular producer prior to the issuance by the Commission of any order, but still only where there was a controversy with such producer. That this construction is a reasonable one is borne out by the consideration that no report of any producer would be made public unless that producer took it upon himself to do something which would result in his having a controversy with the Commission. In other words, the disclosure or non-disclosure of his particular cost report would rest entirely upon himself. Any other construction would produce a ludicrous result, namely that these reports were to remain confidential only so long as the Commission chose to postpone the exercise of its primary function—price fixing—and then they were to be opened wholesale to the prying eyes of the world.

It still remains to consider in what instances disclosure of a particular producer's individual cost report might have been made by the Commission under the provisions of the 1935 Act, since, as we contend, those instances remain of the same general character under the 1937 Act. The first of these would be on an issue of confiscation where maximum prices are prescribed (Sec. 4 II (c)). Under the 1937 Act the merit of an allegation of confiscation might be determined while the Commission still had control of the proceeding, *i. e.*, before it issued an order, whereas this would not have been possible under the 1935 Act. There might also be an issue of confiscation under minimum

prices. There could be a controversy raised by a charge that the individual Code member had filed insufficient or false information, contrary to his duty as a Code member (Sec. 4 II (k)). At any rate, it appears that there are any number of instances where, in the course of proceedings before the Commission, there might arise a controversy with a particular producer to resolve which it would be necessary to disclose *his* cost report.

Section 10 (a) Does Not Authorize Commission to Require Submission of Cost Reports Used in Price-Fixing Process, and Fact that Commission Purported to Act Under Section 10 (a) Cannot Destroy Code Members' Rights.

In requiring the filing of cost and realization reports, the Commission, however, purported to act under Section 10 (a). This section is no part of the Code and applies to "producers." Section 10 (a) provides as follows:

> "The Commission may require reports from *producers* and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from *a producer* disclosing costs of production or sales realization shall be made public without *the* consent of *the producer* from whom the same shall have been obtained, except where such disclosure is made in evidence

in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Italics ours.)

Because the Commission purported to require the submission of cost reports under this section and not under Section 4 II (a), it now claims the right to disclose, pursuant to the exception in Section 10 (a), reports made by Code members. We have already shown that the legislative history of the exception in Section 10 (a) shows beyond doubt that it is strictly limited in its application, and in no event authorizes disclosure in the wholesale manner here proposed. There still remains to consider, however, (1) whether Section 10 (a) authorizes the Commission to require the submission to it of cost reports used in the price-fixing process, and (2) whether the Commission, by a disingenuous citation of Section 10 (a) as its authority, has thereby tricked petitioners out of their rights.

It will be noted that Section 10 (a) does not expressly provide that the Commission may require producers to file cost and realization reports as is required of Code members in Section 4, II (a). The power is "The Commission may require reports from producers." Inasmuch as the Commission fixes prices only for Code members it cannot be that the Act means that the Commission should require, for price-fixing purposes, reports from producers other than Code

members. Therefore the reports contemplated by Section 10 (a) must be reports containing information that the Commission may require in order to carry out its duties under the Act, other than its price-fixing duties.

There are numerous such duties, some of which are enumerated in Section 14, and include: investigation of the economic operation of mines, with a view to the conservation of the natural coal resources; safe operation of mines for the purpose of minimizing working hazards; the lowering of distributing costs for the benefit of consumers; and the control of production of coal including allotment of output to districts and producers within such districts, and holding hearings thereon. By paragraph (b) of Section 14, the Commission is required to report the result of its investigations on these matters, together with its recommendations, to the Secretary of the Interior for transmission by him to Congress. Again, by Section 16, the Commission is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to transportation of coal. Under Section 4-A it is the duty of the Commission, either upon petition or upon its own motion, to determine, after hearing, whether coal sold in intrastate commerce or whether producers selling only in intrastate commerce should be subject to regulation under the Code. The information obtained in Section 10 (a) would be of use in determining these questions. Also by Section 2 (a), the Commission is

authorized to conduct research into numerous problems affecting the industry, and in the discharge of these various duties information acquired under Section 10 (a) would be useful.

At any rate, close study of the statute indicates that the Commission has numerous duties other than those set out in the Code. When we look at Section 10 (a) we find a general power to require reports of producers, as distinguished from Code members, and it is reasonable to suppose that Congress intended this power to be used in connection with the performance by the Commission of its duties other than those set out in Section 4. This construction is further justified by the fact that the power of the Commission to require reports from producers, contained in Section 10 (a), could be excised completely from the statute without interfering in the slightest with the performance by the Commission of its duties under Section 4, that section containing complete authority and power for the Commission to gather information essential to the performance of its duties there set forth. On the other hand, the Commission would be unable properly to perform its duties under these other sections, to which attention has been called, without the authority contained in Section 10 (a) to require reports from producers.

This construction as to the application of Section 10 (a) is further borne out when resort is had to legislative history. Section 4, Part II, (a) of the 1935 Act required that the producers' cost reports be submitted

to the District Boards or to Statistical Bureaus which the District Boards were authorized but not required to establish. The District Boards had no connection with the Commission except that the Commission exercised a degree of supervision over their activities in certain particulars not here involved. Hence under the 1935 Act the producers' individual cost reports, upon the basis of which weighted average cost was determined, never came either into the possession or under the official scrutiny of the Commission. Undoubtedly the 1937 Act established Statistical Bureaus under the control of the Commission for the receipt of these cost returns in order further to insure their secrecy, inasmuch as the district board was composed of coal operators, except for one labor representative, and it was feared that these coal operators would have access to the reports of their competitors.

This is borne out by the testimony of the Hon. Charles S. Hosford, then Chairman of the National Bituminous Coal Commission, in the hearings on S-1, 75th Congress, before the Senate Committee on Interstate Commerce, and found at page 14 of the transcript of such hearings.* In explaining the changes proposed Chairman Hosford testified in part as follows:

"* * * One change from the administrative standpoint is that the statistical bureaus, which are provided to be set up in the various districts, are

*The right to refer to the testimony before a committee of Congress of an official charged with the administration of an Act in order to determine the purpose of changes proposed in an Act and thereafter made, is sustained in an able opinion by Judge Learned Hand in *Securities & Exchange Commission* v. *Robert Collier & Co., et al.*, 76 Fed. (2d) 939. See also *Smith* v. *Gilliam* (D. D. Ky.), 282 Fed. 628; *Suckowski* v. *Norton* (D. C. Pa.), 16 F. Supp. 677.

made part of the Coal Commission's organization and are no longer a part of the district board of the industry's organizations. That was done for two reasons. When the Carter case was heard, one of the objections made to various provisions of the bill was that under that plan confidential information of individual coal producers was submitted to a statistical bureau set up by a district board, and as a result such confidential information might fall into the hands of competitors. Then, again, there have been doubts at times as to whether in all cases the statistical bureaus operated by the district boards completely met the requirements of the Commission as to the work to be performed by them."

It is now contended that the very Congress which made this change in the Act to further strengthen the assurance of secrecy of the reports of Code members, intended, by another change made by it in an exception to another provision of the Act, to destroy the very secrecy which the first change was made to preserve.

It is important to bear in mind that the general authority granted to the Commission by Section 10 (a) of the 1937 Act, to require reports from producers is word for word the same as the corresponding provisions of Section 10 (a) of the 1935 Act, but it is apparent that Congress never intended, by section 10 (a) of the 1935 Act, to give the Commission power to require cost reports from producers to be used as the basis for determining weighted average costs, because it had already provided that such reports be submitted to the District Boards, which were required to hold

them "as the confidential records of the Code member." There was thus no ambiguity in this connection in the 1935 Act because Section 4 II (a) and Section 10 (a) obviously related to two entirely different matters, involving two separate and distinct agencies. It can hardly be seriously argued that when Congress, in the 1937 Act, required the reports used in the price fixing process to be submitted to the Statistical Bureaus instead of the District Boards, and at the same time made no change in the language in the first sentence of Section 10 (a), it intended to change the whole scope of Section 10 (a) and to give the Commission authority *under that section* to require the submitting to it of the cost reports used in the price fixing process. To impute to Congress such an intention would be to impute to it the further intention to over-ride the specific provisions of Section 4 relating to the confidential nature of these reports.

An argument was made in the Court below by counsel for respondents, to the effect that since the Commission, in its Order No. 15 requiring the filing of cost and realization data by coal producers, purported to act under the authority of Section 10 (a), therefore the provisions contained in that section relating to the disclosure of such information furnish the measure of a Code member's rights, and hence the provisions in Section 4 II (a) unqualifiedly prohibiting disclosure are not applicable.

This argument is utterly lacking in substance. As we have undertaken to show, Section 10 (a) cannot be the measure of a Code member's rights. Code members are under a positive and express duty, set out in

Section 4 II (a), to file with the proper Statistical Bureau such information as to costs and realization as the Commission may authorize or require. The important fact is that the Commission, by its Order 15, did require the filing of such information. It is immaterial whether the Commission purported to act under Section 10 (a) or Section 4 II (a). So far as Code members are concerned the only question which confronted them, when called upon to file the reports, was whether any section authorized the Commission to require such filing. The cost forms stated on their face that the information was required under the terms of the Act and was "therefore confidential," without referring to any particular section of the Act. Turning to the Code they had signed, they found this authority in clear terms in Section 4 II (a), and they would not have been justified in declining to file such reports because the Commission cited, in Order 15, the wrong section of the Act as its authority. Clearly, Order 15 would have been good if the Commission had cited no section of the Act as its authority. And if the argument made by counsel is valid, then the Court will be required to upset a long line of cases decided by this Court, which, ever since *Veazie Bank* v. *Fenno,* 8 Wall. 533, 19 L. Ed. 482, has held that the validity of an Act of Congress is not to be measured by the particular power in the Constitution under which Congress purported to act, but by the power, if any, which authorizes the substance of what was done, regardless of its form. Also if such argument is valid, then it is fair to say that two other conclusions will follow: first, that each admin-

istrative body must, in each administrative order, cite properly the section of the statute specifically authorizing its proposed action, or imperil the validity of its action; and, second, that by disingenuous citation of inapplicable sections of the statute, administrative bodies could trick persons subject to regulation out of their rights. We cannot believe that this Court will so sacrifice form to substance as to uphold any such legal casuistry.

To Construe Act as Authorizing Wholesale Disclosure of Cost Reports of Code Members Violates Two Established Rules of Construction, and Renders Useless Elaborate Provisions Made by Congress to Insure Secrecy.

Petitioners insist that among the immunities which they obtain for assuming the obligations of Code members is the immunity from wholesale disclosure in the manner proposed of their individual cost and realization reports; that the Code expressly so provides and the Code is in the terms of the statute. They further insist that to construe the exception contained in Section 10 (a) so as to authorize a general disclosure of these confidential reports not only violates their rights under the statute and the Code, but also violates two well established rules of construction: (a) That where possible an Act must be construed so as to give force and effect to each of its provisions and to avoid, if may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed. *Township of Montclair* v. *Ramsdell*, 107 U. S. 147, 27 L. Ed. 431, 2 Sup. Ct. Rep. 391;

Peck, et al., v. *Jennes, et al.*, 7 How. 612, 12 L. Ed. 841; and (b) "Exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy" the general policy to which it is an exception. *Spokane & Inland Empire R. Co.* v. *United States*, 241 U. S. 344, 60 L. Ed. 1037, 36 Sup. Ct. Rep. 668. See also *U. S.* v. *Ewing*, 140 U. S. 142, 35 L. Ed. 388, 11 Sup. Ct. Rep. 743.

The Act sets up elaborate machinery to protect the confidential nature of the individual reports of code members. It provides for Statistical Bureaus, to which such reports shall be made, and provides that "all such records shall be held by the Statistical Bureau as the confidential records of the code member filing such information." It provides (see pp. 58-61) that the district boards shall determine "*from cost data* submitted by the proper Statistical Bureau of the Commission" the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936, and adjust same to reflect certain changes or trends, and that "Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum price area" and that "The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum price area in the calendar year 1936", also adjusted to reflect certain changes and trends.

It will be seen that the Act fairly breathes secrecy with respect to the individual cost data of code members. No one is to see it except the Statistical Bureau,

which shall hold it "as the confidential records of the Code member filing such information." The Act then proceeds to provide that "no producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a District Board or employee or representative thereof shall be an employee of any Statistical Bureau," thereby clearly indicating that the District Boards shall not have knowledge of the records which the Statistical Bureau is to hold as confidential.

On the other hand, the District Boards are composed of coal producers, except one member who is a representative of Labor. Why should Congress have been at pains to provide that the reports should be made to the Statistical Bureau, that such Bureau should hold them as the confidential records of the Code member, that no one connected with the coal industry shall be on the Statistical Bureau, that the District Boards should make their determination "from cost *data* submitted by the proper Statistical Bureau of the Commission," that the Commission should make its determination from the figures and computations submitted to it by the District Boards, if, by the exception to the rule in Section 10 (a), the whole elaborate design to insure secrecy was to be destroyed by an order of the Commission when it came to hold hearings to establish minimum prices? Such a construction imputes to Congress either an intention to mislead and deceive or ignorance as to the meaning of the exception in Section 10 (a). Can it be that Congress intended, after setting up such elaborate machinery to protect the con-

fidential nature of these reports of code members, that the Commission should or could nullify the operation of such machinery and defeat the purpose thereof by simply ordering all such reports made available for inspection?

Why should Congress have provided, as it did in Section 4 II, (a), that "the weighted average figures of total cost, determined as aforesaid, shall be available to the public", if it intended that the individual returns from which such weighted average figures are computed should themselves be available for public inspection? Again, why should Congress have provided, as it did in the exception to Section 10 (a), applicable to producers "that such information may be compiled in composite form in such manner as shall not be injurious to the interest of any producer, and, as so compiled, may be published by the Commission" if it intended to give to the Commission authority to make public all the individual returns whether or not injurious to the interest of any producers? Finally, why should Congress have provided, as it did in Section 4 II (a), that the reports of Code members "shall be held by the Statistical Bureau as the confidential records of the Code member filing such information" if it extended by the exception in Section 10 (a) that the Commission should make them public wholesale? In the light of all these provisions running throughout the Act, it is submitted that the construction of the exception in Section 10 (a) contended for by the respondents is absurd.

It is therefore submitted that making available for inspection the individual cost and realization returns of all Code members in the manner proposed does violence not only to the right of Code members under the Code and to numerous specific provisions of the Act, but to the spirit and purpose which run throughout the Act; and that the Court may not, under any recognized rule or theory of construction, so construe the exception, which is ambiguous at best, as to cause this result. *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172, 13 L. Ed. 92.

In No Event Does Act Authorize Treatment of Petitioners' Cost Reports in Manner Here Proposed.

It is important to bear in mind what the Commission proposes to do with the petitioners' cost reports herein. As appears from the Commission's order of August 31, 1938 (R. 7, 8), the Commission has introduced in evidence a compilation of the cost data for each district, and it now proposes to make petitioners' and other producers' cost reports available *for inspection* and for introduction in evidence as bearing on the correctness of the compilation.

By no stretching of the language or process of construction can Section 10 (a) of the Act, quoted above, be said to authorize this unique procedure. The nondisclosure provision of that section provide:

> "No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the pro-

ducer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission* or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Italics ours.)

Even construing these provisions in the manner most favorable to respondents, which construction we have already shown brings about a ridiculous result, disclosure can be deemed to be authorized *only where such disclosure is made in evidence* in a hearing before the Commission. But the Commission is not satisfied with this limitation on its authority and in order to support its proposed action invokes a rule, of which it is convinced Congress must have been aware and in spite of its efforts to make these reports confidential tacitly approved, that where it would not be practicable to introduce in evidence a mass of documents, an expert may summarize them if the originals are available for inspection. Then by giving the results of this rule a name—"constructive introduction in evidence"—the Commission considers itself absolved from any charge of not complying with the statute.

It is clear that Congress did not so intend, for it would be ludicrous to assume that Congress would create such detailed and elaborate machinery for insuring the secrecy of these cost reports if it intended that the moment the Commission initiated a hearing in connection with its most important function under

the Act—price-fixing—the Commission was to open every single one of them to the prying eyes of anyone who perchance was sufficiently desirous of seeing them to go to the trouble of mailing a piece of paper to the Commission designated as a notice of appearance.

Cost Reports Will Have No Bearing Whatsoever on Issue in Respect of Which Commission Intends to Use Them.

Assuming, without conceding that the Act does authorize the Commission with respect to some hearings either (1) to introduce petitioners' cost reports in evidence wholesale; or (2) to make them available wholesale for inspection and introduction in evidence, it does not therefore follow that the Act authorizes the Commission to do so in this hearing.

It could not be seriously contended, for example, that in a hearing held for the purpose of determining whether the territorial boundaries of a district should be revised, as is required in Section 4, Part I, the Commission would have authority to introduce petitioners' cost reports in evidence. The reason is obvious—the reports would have no relevancy to the question under determination. This is but an exaggerated example illustrating the contention we now make that the cost reports would have no bearing whatsoever on the issue in respect of which the Commission intends to use them.

The individual cost reports, if introduced in evidence at the present stage of the proceeding before the Commission, could have bearing on but two issues:

(1) Did the Commission, did the District Board, did the Statistical Bureau perform their respective duties in accordance with the mandates of the statute, and (2) are the individual cost reports themselves correct, *i. e.*, do they truly reflect the cost of production at the mines to which they relate? It is extremely important to bear in mind that the ruling of the Commission of March 30, 1938, recites that the cost reports will be made available for inspection and introduction in evidence as bearing solely on but a part of the first issue, viz., to support its and the District Boards' cost determinations. See also Commission's order of August 31, 1938 (R. 7, 8). Hence the question arises, have such reports any relevancy in connection with that issue?

The duties of the Commission, of the District Boards, and of the Statistical Bureau under the Act, so far as they relate to the present proceedings, are to be found in Section 4, the applicable portions of which are quoted below:

> "(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.
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> * * * * * * * *

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, *determined as hereinafter provided,* of the tonnage of such minimum price area.

* * * * * * * *

"As soon as possible after its creation, each district board shall determine, *from cost data submitted by the proper statistical bureau* of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any change in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine

the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices.

* * * * * * * *

"(b) District boards shall, under the rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at point of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The min-

imum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return, *as provided in subsection* (*a*) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of Part II of this section." (Italics ours.)

It will be noted from the above quoted portions of Section 4 of the Act that *the Statistical Bureau is the only agency which has the right under that section to see the individual cost returns.* Its duty is to transmit "cost data" to the District Boards, in statistical form presumably, for not only the very name "Statistical Bureau" but also the existence of the Statistical Bureau at all, leads to such a construction. The District Boards in turn, on the basis of the data submitted by the Statistical Bureau, and not on the basis of the individual cost returns, compute the weighted average of the total cost of the tonnage produced in the dis-

trict, and make adjustments for certain trends and changes not here relevant. The District Boards transmit this weighted average figure to the Commission, together with the computations upon which it is computed, and the Commission, in turn, on the basis of the figures and computations received from the District Boards (which, of course, include the data which the District Board received from the Statistical Bureau) computes the weighted average of total cost of the tonnage produced in each minimum price area, making certain adjustments for trends and changes not here relevant. At this stage of the procedure no prices are fixed. The computation of the Commission merely serves as a basis for the proposal and coordination of minimum prices which the District Boards make, and which the Commission reviews and may revise, and by order carries into effect.

It will thus be noted that the duties of the District Boards and of the Commission are described in detail in Section 4, and, more important, the data upon which they are required to make their computations are also specifically set forth *and this data does not, by the terms of the Statute itself, include the individual cost returns.* It is difficult to see how the individual cost report could possibly have any bearing on the question of whether the Commission or the District Boards performed their respective duties under the provisions of the statute set out above.

If it be contended that there is no way of knowing whether the Commission complied with the mandates of the statute and arrived at its computation in the

manner directed by the statute, the answer is that all the evidence upon which it is required to base its computation either has already been or can, without any objection by petitioners, be made a part of the record in the proceeding before the Commission. *This consists, as required by the statute, of the cost data submitted to the District Boards by the Statistical Bureaus, and the weighted average cost figure for each district, together with the computations upon which it is based, submitted by District Boards to the Commission. The Commission is not required to make its computation from the individual cost reports.* If it be contended that there is no way of knowing whether the District Board complied with the statute and arrived at its computation in the manner directed by the statute, the answer is that all the evidence upon which the District Board is required to base its computation either already is or can, without any objection by petitioners be made, part of the record in the proceeding before the Commission. *This consists of the cost data submitted to it by the Statistical Bureau. The District Boards are not required to make their computations from the individual cost reports.* If it be contended that there is no way of knowing whether the Statistical Bureau complied with the statute and caused the cost data to truly reflect the individual cost returns for each district, the answer is, first, that the Commission's ruling of March 30, 1938 (R. 5, 6) states that the reports will be used for the sole purpose of supporting its and the District Boards' cost determinations; and second, that the statute itself requires

that the individual cost returns be kept confidential by the Statistical Bureau.

The Court May Not Change the Plain Terms of the Act in Order to Make It Constitutional.

Respondents in paragraphs 6, 8, and 10 of their motion to dismiss the bill of complaint allege that failure to disclose the cost reports would deprive interested parties of a full and fair hearing in accordance with due process of law and further contend that inasmuch as failure to disclose the individual cost returns would at least raise a serious constitutional question, it is the duty of the Court so to construe the Act as to avoid any question as to the constitutionality of the proceedings thereunder. In making this contention it is admitted by opposing counsel that there may be "some inconsistency" between Section 4 II (a) applicable to Code members and the exception in Section 10 (a) as construed by the Commission and for which construction counsel for the respondents here contend. But it is insisted by counsel that in order to avoid any question of constitutionality the Court should ignore this inconsistency. If, as plaintiff contends, the plain terms of the Act prohibit such construction, then the Court is without power to rewrite the Act or to ignore its plain terms in order to avoid a possible question of the constitutionality of the proceedings of the Commission under the Act.

This Court has so held in two recent cases. In *Hopkins Federal Savings & Loan Asso.* v. *Cleary*, 296 U. S.

315, 80 L. Ed. 251, 56 Sup. Ct. Rep. 235, this Court had before it an Act of Congress, known as the Home Owners Loan Act of 1933, Section 5 (i) of which authorized certain State associations to convert themselves into Federal associations under the Act, upon a vote of 51% of their stock, at a meeting called to consider such action. The State Supreme Court had held that in order to make this section constitutional it must be read as subject to the implied condition, that the conversion could not take place in contravention of the laws of the State, and that the 51% requirement should be read as a minimum requirement and it so construed it.

This Court held that Section 5 (i) was too clear for the application of the rule of construction applied by the Wisconsin Court, and, in answer to the contention that the Court should construe the Act so as to avoid any question as to its constitutionality, this Court said, quoting from the case of *George Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 77 L. Ed. 1265, 53 Sup. Ct. Rep. 620:

> "'But avoidance of a difficulty will not be pressed to the point of disingenuous evasion.' * * * 'Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power.' * * * The problem must be faced and answered."

The Court proceeded to hold that, construed according to the plain intent of Congress, the section of the Act in question was unconstitutional. So we say

here, paraphrasing the language of this Court in the case just cited, that "the intention of the Congress is revealed too distinctly to permit the Court to ignore it because of mere misgivings as to power," and to hold to the contrary would be "disingenuous evasion." Here, however, it is not necessary to hold any provision of the Act unconstitutional, as in the *Hopkins case*, in order to give effect to the intent of Congress, so distinctly revealed.

The question as to the validity of action of the Commission in prescribing minimum prices without having introduced in evidence or made available for inspection the individual cost reports, is not now before the Court and not necessary for the Court to decide. However, we shall undertake to establish that the introduction in evidence of such individual cost reports is not necessary to the validity of an order of the Commission prescribing minimum prices.

Congress Had Power to Prohibit the Disclosure of Individual Cost Reports Used as a Basis for Calculating Average Cost, and the Disclosure of Such Reports When so Prohibited, is Not Essential to the Validity of an Order Establishing Prices.

The respondents contend in paragraphs 6, 8 and 10 of their motion to dismiss that the individual cost reports of the producers must be made available for introduction in evidence if the hearing prior to the issuance of the minimum price order is to be a "fair hearing," consistent with the Due Process Clause of

the Fifth Amendment. If we are correct in our contention that the Act prohibits such use of individual reports, then the question is, had Congress power to provide that individual cost reports should be used as the basis for calculating average costs without disclosing such reports and without depriving any one of due process? It is true Congress provided for a hearing, but it also expressly provided, if we are correct in our interpretation of the Act, that the average cost should be arrived at by the Commission and the District Boards on the basis of data which does not include the individual cost returns, whose secrecy is thus preserved. We insist that Congress had this power. There is no question but what Congress itself, without any hearing, could have fixed the basis upon which the Commission was to establish minimum prices. *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. Rep. 48. It logically follows that Congress can delegate to an administrative agency the power to fix this basis without a hearing if it grants that agency no discretionary power, but, on the contrary, gives it detailed and specific instructions as to the manner in which, and on the basis of what data, the computation of that basis is to be made; for it is only where such an agency is granted the power to exercise discretion that a hearing having the attributes of a judicial hearing must be held. *Morgan* v. *United States,* 304 U. S. 1, 82 Law Ed. 757, 58 Sup. Ct. Rep. 773.

The contention of respondents ignores the whole scheme of the Bituminous Coal Act of 1937, for in order to conclude what Congress meant when it used the

word "hearing," and whether the administrative hearing is a "fair hearing," it is necessary to discover what Congress has provided as to such hearing and what are the duties of the administrative agency created by Congress, as well as what that administrative agency is required under the Act to do before it can issue an order. The word "hearing" cannot be defined with any exactness. What constitutes a "fair hearing" in one situation may violate "the rudimentary requirements of fair play," in another. Compare the decision of this Court on the petition for rehearing in *Morgan* v. *United States,* 304 U. S. 1, 82 L. Ed. 1030, 58 Sup. Ct. Rep. 999, and its decision in *National Labor Relations Board* v. *Mackay Radio & Teleg. Co.,* 304 U. S. 333, 82 L. Ed. 861, 58 Sup. Ct. Rep. 904. Plaintiffs do not contend that there is to be no hearing prior to the issuance of a minimum price order. They do contend that the word "hearing" must be read in connection with other provisions of the statute; that Congress having made specific and detailed provision for the manner in which, and upon the basis of what data, the computation of weighted average cost is to be arrived at, *which data does not include the individual cost returns,* and having made further specific provision for keeping the individual cost returns confidential, cannot be said to have intended, by the use of the word "hearing," to have destroyed the structure which it so carefully raised. As said by this Court in *Norwegian Nitrogen Products Company* v. *U. S.,* 288 U. S. 294, 317, 77 L. Ed. 796, 53 Sup. Ct. Rep. 350:

"We are not unmindful of cases in which the word 'hearing' as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. *The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen.*" (Italics ours.)

It seems that in order to determine what is meant by "hearing," and what constitutes a "fair hearing," as applied to the proceeding before the Commission in its present stage, it is necessary to determine first to what issues the hearing is to be directed. We have already pointed out above that if the individual cost reports were introduced in evidence at the present stage of the proceeding before the Commission, there are only two issues: (1) Did the Commission, did the District Board, did the Statistical Bureau perform their respective duties in accordance with the mandates of the statute, and (2) are the individual cost reports correct, that is, *i. e.,* do they truly reflect the cost of production at the mines to which they relate. But inasmuch as the ruling of the Commission of March 30, 1938, recites that these cost reports will

be made available as bearing solely on the first issue, the necessity from a due process standpoint of making them available as bearing on the second issue, need not now be discussed. See also Commission's order of August 31, 1938 (R. 7, 8).

Obviously neither a "hearing" nor a "fair hearing" contemplates the requirement that data be disclosed having no relevancy to the matter as to which the hearing is held. Would the individual cost reports have any relevancy to the first issue described above? We have already shown that Section 4, Part II, of the Act, prescribes in detail the manner in which and upon the basis of what data the District Boards and the Commission are to determine weighted average cost for 1936. To repeat, the district boards are required to make this determination from "cost data" submitted to them by the proper statistical bureau. This computation (adjusted for certain trends not here relevant) the District Boards are required to submit to the Commission which in turn, on the basis of the figures and computations received from the District Boards (which of course includes the data which the District Board received from the Statistical Bureau) computes the weighted average of total costs of the tonnage produced in each minimum price area, it also making certain adjustments for trends not here relevant. At this stage of the proceeding no prices are fixed. The computation of the Commission merely serves as a basis for the proposal and coordination of minimum prices which the District Boards make, and which the Commission corrects or adopts and by order carries into effect.

Thus it will be noted from the portions of the Act above-quoted that the duties of the Commission are two-fold, one mechanical and the other *quasi*-judicial. The Commission acts mechanically, *i. e.*, makes a simple mathematical calculation in accordance with prescribed instructions and on the basis of specified data which the Act prescribes, ***and which does not include the individual cost returns,*** when it determines the weighted average of total costs for a minimum price area. The same is true of the District Boards. The Commission acts *quasi*-judicially when it determines (and on the basis of which determination, it issues a minimum price order), that the coordination of minimum prices, proposed by the District Boards, conforms to the substantive standards of Subsections (a) and (b) of Part II of Section 4, such as whether they are fair and equitable as between producers and as between districts, whether they reflect relative market values, whether they will produce a return approximating the weighted average cost, etc.

Up to and including the point in the statutory scheme at which the Commission computes the weighted average of total costs for a minimum price area, neither the Commission, the District Board, nor the Statistical Bureau has acted in a *quasi*-judicial capacity, except possibly in making the adjustments for trends already referred to. As to the adjustments, it would be proper to receive, and the Commission has received, evidence in support of those made. On the contrary, to ascertain the basic 1936

cost it has been required only to make a simple mathematical calculation on the basis of specific data prescribed by the statute, which does not include the individual cost returns. It has acted in a mere ministerial capacity. When Congress commands its agent to compute the basis for minimum prices to be established, and gives that agent specific and detailed instructions as to how, and upon the basis of what data, such computation is to be made, Congress is not delegating power in the sense that it does when it delegates to the Interstate Commerce Commission the power to fix reasonable rates; it is not delegating power to exercise any discretion; it is not delegating power to arrive at an informed judgment on facts adduced at any "hearing." It is these which are the attributes of administrative action of a *quasi*-judicial character, and it is only when one or more of these attributes is present that the hearing must have the characteristics of a judicial hearing to satisfy the requirements of due process. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. Rep. 185; *Norwegian Nitrogen Products Co.* v. *United States, supra; St. Joseph Stockyard Co.* v. *United States*, 298 U. S. 38, 80 L. Ed. 1033, 56 Sup. Ct. Rep. 720; *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. Ed. 1093, 57 Sup. Ct. Rep. 724; *Morgan* v. *United States, supra.* In the *Morgan case*, this Court was very careful to distinguish between administrative proceedings of a *quasi*-judicial character and other administrative proceedings. In that case the Court said:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and *that in administrative proceedings of a quasi-judicial character* the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' —essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" (Italics ours.)

If it be contended that there is no way of knowing whether the Commission complied with the mandates of the statute and arrived at its computation in the manner directed by the statute, the answer is that all the evidence upon which it is required to base its computation has already been or can be, without objection by petitioners, made a part of the record in the proceeding before the Commission. This consists, as required by the statute, of the cost data submitted to the District Boards by the Statistical Bureaus, and the weighted average cost figure for each district, together with the computations upon which it is based, submitted by District Boards to the Commission. If it be contended that there is no way of knowing whether the District Board complied with the statute and arrived at its computation in the manner directed by

the statute, the answer is that all the evidence upon which the District Board is required to base its computation is already or can be, without objection by petitioners, made part of the record in the proceeding before the Commission. This consists of the cost data submitted to it by the Statistical Bureau. If it be contended that there is no way of knowing whether the Statistical Bureau complied with the statute and caused the cost data to truly reflect the individual cost returns for each district, the answer is, first, that the ruling of the Commission of March 30, 1938, provides that the individual cost reports are to be available for inspection as bearing solely on the correctness of its and the District Board's calculations, and not the Statistical Bureau's, and, second, that the statute itself requires that the individual cost returns be kept confidential by the Statistical Bureau. See also Commission's order of August 31, 1938 (R. 7, 8).

Individual Cost Reports Not of Themselves Competent Evidence. Their Verity Must Be Subject to Test, and Such Test Would Render Administration of Act Impossible.

The orders of the Commission directed that the individual cost reports be made available only for the purpose of establishing "the correctness of said composite reports heretofore introduced in evidence in this proceeding." These composite reports are those compiled from individual reports. It is therefore apparent that the Commission proposes that there shall be no opportunity for interested parties to test the

individual reports to ascertain whether they truly reflect the cost of production at the mines to which they relate. It is clear, however, that the individual cost reports would not be admissible as evidence over objection unless interested parties be permitted to test their truth and verity and to introduce evidence to show that they are not correct. Such use would require subpoening, to testify at the hearing before the Commission, the officers of each company who verified the report, as well as the books and records of each such company from which the reports were made. Because of the large number of reports that were filed for 1936 alone, such use of these reports would prolong the administrative proceeding indefinitely, encumber the administrative record unnecessarily, and result in the expiration of the Act by its own terms before any minimum price could be fixed. "There must be a limit to individual argument in such matters if government is to go on." Holmes, J., in *Bimetallic Investment Co. v. State Board of Equalization*, 239 U. S. 411, 60 L. Ed. 372, 36 Sup. Ct. Rep. 141.

The Interstate Commerce Commission, which is the oldest administrative agency, does not hesitate to exercise its power to fix rates of common carriers between particular points and on particular traffic without evidence which shows the underlying cost and transportation data of the railroads by divisions or by commodities. On the contrary, most of the decisions of that Commission which prescribe rates of common carriers are based on system or group aver-

ages of operating costs of carriers and on records that do not show such underlying data. A few of such cases are cited: *Iron Ore Rate Case,* 41 I. C. C. 181; *Public Service Commission of Georgia* v. *A. C. L. R. Co.,* 186 I. C. C. 156; *Adriatic Mining Co.* v. *C. & N. W. Ry. Co.,* 78 I. C. C. 611; *Bituminous Coal to C. F. A. Territory,* 46 I. C. C. 66; *A. C. L. R. Co.* v. *Arcade & Attica R. R.,* 194 I. C. C. 746; *Rates on Cotton, etc.,* 208 I. C. C. 677; *B. & O. R. Co.* v. *U. S.,* 298 U. S. 349; *New England Divisions Case,* 66 I. C. C. 196, sustained by this Court in *New England Divisions Case,* 261 U. S. 184, 67 L. Ed. 605, 43 Sup. Ct. Rep. 270. The order of the Commission in that case was challenged by certain railroads on the ground that it was based on evidence of average or typical divisions of the railroads involved and not on the individual divisions of each of the carriers. The Court answered that contention in these words:

> "Obviously, Congress intended that a method should be pursued by which the task, which is imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed 600; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication in respect to each division of such rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also, that the Commission

had been confronted with similar situations in the past and how it had dealt with them."

We therefore submit that Congress has delegated no discretionary power in directing its agency to make specified computations from designated underlying figures and therefore Congress was acting within its power when it provided that such underlying figures be held as the confidential records of the citizens furnishing them.

Other Acts of Congress Provide for Administrative Determination on Basis of Statistics Compiled Without a Hearing.

The Bituminous Coal Act of 1937 is not the only recent Act of Congress which provides for administrative determinations to be made on the basis of statistics. The Agricultural Adjustment Act of 1938 (52 Stat. 31), for example, imposes marketing quotas on farmers in the case of certain commodities when the Secretary of Agriculture finds, on the basis of the latest available statistics of the Federal Government, that the current supply of the commodity concerned is a specified percentage above normal. In the case of tobacco, for example, both the determination of whether the quota should be imposed, as well as of the number of pounds which may be marketed, is made by the Secretary on the basis of the latest available statistics of the Federal Government. The national quota is apportioned among the various producing States on the basis of past production therein over a

specified period, and the State quota is apportioned among the various producing counties on the basis of past production therein over a specified period, all as determined by the Secretary from the latest available statistics of the Federal Government. Of course, the quota for the individual farm depends on the amount of the national and the State as well as the County quota. But the Act does not stop here. It provides that the allotment of the county quota to individual farms is to be made on the basis of their past production over a specified period, the termination to be made from the latest available statistics of the Federal Government. No provision of the Act authorizes the disclosure of the underlying data upon which these statistics are computed. If there were such a provision, the Act would be rendered totally unworkable.

The Agricultural Adjustment Act of 1933 (48 Stat. 32), provided for a processing tax with respect to certain commodities, the rate of which was equal to the difference between the current average farm price of the commodity, as determined by the Secretary of Agriculture on the basis of statistics, and the fair exchange value of the commodity, also as determined by the Secretary on the basis of statistics. That Act contained no provision authorizing the disclosure of the underlying data. This Court, in *United States* v. *Butler*, 297 U. S. 1, 80 L. Ed. 477, 56 Sup. Ct. Rep. 312, in holding the Act unconstitutional, did not so much as intimate that it found any fault with the fixing of a tax rate in such a manner.

The Sugar Act of 1937 (50 Stat. 1100) provides for a sugar quota in each year, specified portions of which are to be allotted to each producing area. The amount of the quota is based on the domestic requirements for sugar, as determined by the Secretary of Agriculture on the basis of official statistics of the Department of Agriculture. The Secretary is also given power to prorate the allotment made to any producing area among the producers therein. No provision of the Act authorizes the disclosure of the underlying data upon which the official statistics are computed. If any provision did, not only would the Sugar Act of 1937 be rendered totally unworkable, but also the Bureau of Agriculture Economics, which compiles the Department statistics, would, because of the necessity of appearing continuously at hearings, cease to function as a Statistical Bureau.

The Fair Labor Standards Act of 1938 (52 Stat. 1060), generally known as the Wage and Hour Act, adopts a procedure for fixing minimum wages strikingly similar to that adopted in the Bituminous Coal Act of 1937. The Fair Labor Standards Act provides for the creation of an industry committee for each industry, whose duty it is to recommend to the Administrator the highest minimum wages for their respective industries which will not substantially curtail employment in the industry. The Administrator then holds a hearing, and if he finds that the wages recommended are the highest which can be paid without substantial curtailment of employment, he approves them, otherwise he rejects them.

In order to discharge their functions, the committees and the Administrator must know, for each industry, its total costs, its wage costs, its realization and its competition. How are these matters to be ascertained and proved in evidence? The Act does not say. But if public inquiry must be made into the affairs of each employer in each industry, or if the reports on these matters made by all the employers in each industry are to be exposed to the public or introduced in evidence at the hearings and subjected to inquiry as to exactness, then this Act cannot, as a practical matter, be administered.

If respondents in this suit are correct in their interpretation of the type of hearing required under the due process clause, the validity of the procedure prescribed by Congress in these other regulatory acts, or their workability, or both, may be subject to grave doubt. All of these Acts deal with far-flung industries of nation-wide extent, and it is reasonable to suppose that Congress, in delegating its legislative functions, should be permitted to adapt the administrative procedure to the ends to be achieved, and that procedural restrictions should not be imposed which would have the practical effect of making the delegation worthless and nugatory.

CONCLUSION.

It is submitted that the District Court had jurisdiction to grant the relief sought and that the complaint states facts sufficient to constitute a cause of action. It is further submitted that the Bituminous Coal Act of 1937, properly construed, prohibits the National Bituminous Coal Commission from making public, in the manner proposed, the cost and realization reports filed with it by Code members, and that in threatening to make such reports public the Commission is transcending the powers conferred upon it and unlawfully assuming the exercise of the power of government against petitioners to their irreparable injury.

It is therefore respectfully urged that the decree of the United States Court of Appeals for the District of Columbia be reversed and that the case be remanded with directions that the respondents be enjoined as prayed.

Respectfully submitted,

ROBERT E. QUIRK,
J. V. NORMAN,
Attorneys for Petitioners.

December 27, 1938.

APPENDIX.

Excerpts From Bituminous Coal Act of 1937.

"Sec. 2 (a). * * * No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. * * *."

"[Sec. 3] (b). In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-a, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection."

* * * * * * * * *

"Sec. 4 [Part I] (a). Twenty-three district boards of code members shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined

by the majority vote of the district tonnage during the calendar year 1936 represented at a meeting of the code members of the district called for the purpose of such determination and for the election of such district board; and all code members within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be code members or representatives of code members truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by a majority in number of the code members of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in the proportion of the annual tonnage output of the code members in the district for the calendar year preceding the date of the election. *Provided,* that not more than one officer or employee of any code member within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected. The Commission shall have power to remove any member of any district board upon its finding, after due notice and hearing, that said member is guilty of inefficiency, willful neglect of duty, or malfeasance in office.

"The district boards shall have power to adopt by-laws and rules of procedure, subject to approval of the Commission, and to appoint officers from within or without their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of the twenty-three districts are set forth

in the schedule entitled 'Schedule of Districts' and annexed to this subchapter.

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that the territorial boundaries or limits of any district or minimum-price area are such as to make it substantially impracticable to establish minimum prices in accordance with all the standards set forth in subsections (a) and (b) of Part II of this section, and that a change in such territorial boundaries or limits or a division or consolidation of such districts or minimum-price areas would render the establishment of minimum prices in accordance with all such standards more practicable, it shall by order make such changes, divisions, and consolidations as it finds will substantially aid in such establishment of minimum prices."

* * * * * * * * * *

"Sec. 4 [Part II]. The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

"(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

"For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer,

employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonable demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration."

* * * * * * * * *

"As soon as possible after its creation, each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which

may have been established since January, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until change by the Commission, for the proposal and establishment of minimum prices.

* * * * * * * * *

"(b) District boards shall, under the rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at point of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein be-

low or above the minimum return, as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of Part II of this section.

"(c) When in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided*, That no maximum price shall be established for any mine which shall not yield a fair return on the fair value of the property.

"(d) If any code member of district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) and (c) of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of sub-

sections (b) and (c) of this section. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act."

* * * * * * * * * *

"(j) The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

"(k) In the investigation of any complaint or violation of the code, or of any rule or regulation the observance of which is required under the terms thereof, the Commission shall have power by order to require such reports from, and shall be given access to inspect the books and records of, code members to the extent deemed necessary for the purpose of determining the complaint. Any such order shall be subject to review as are other orders of the Commission."

* * * * * * * * * *

"Sec. 4-A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person

or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

"Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such applications. As a condition to the entry of and as a part of any order granting such application, the Commission may require the application to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any

applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6."

• • • • • • • • • •

"Sec. 5 (a). Upon the appointment of the Commission it shall at once promulgate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptance, when executed, shall be acknowledged before any official authorized to take acknowledgments."

• • • • • • • • • • •

"Sec. 14 (a). The Commission shall study and investigate the matter of increasing the uses of coal and the problems of its importation and exportation; and shall further investigate—

(1) The economic operations of mines with the view to the conservation of the national coal resources.

(2) The safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to utilize the services of the Bureau of Mines.

(3) The problem of marketing to lower distributing costs for the benefit of the consumer.

(4) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of coal and methods of such control, including allotment of output to districts and producers within such districts and shall hold hearings thereon.

(b) The Commission shall annually report the results of its investigations under this action, together with its rec-

ommendations, to the Secretary of the Interior for trans
mission by him to Congress."

* * * * * * * * *

"Sec. 16. To safeguard the interests of those con
cerned in the mining, transportation, selling, and consump
tion of coal, the Commission or the office of consumers' coun
sel is hereby vested with authority to make complaint t
the Interstate Commerce Commission with respect to rate
charges, tariffs, and practices relating to the transportatio
of coal, and to prosecute the same. Before proceeding t
hear and dispose of any complaint filed by another tha
the Commission, involving the transportation of coal, th
Interstate Commerce Commission shall cause the Commi
sion and the office of consumers' counsel to be notified o
the proceeding, and, upon application to the Interstat
Commerce Commission, shall permit the Commission an
consumers' counsel to appear and be heard. The Interstat
Commerce Commission is authorized to avail itself of th
cooperation, services, records, and facilities of the Com
mission."

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CLERK

No. 528

In the Supreme Court of the United States

OCTOBER TERM, 1938

UTAH FUEL COMPANY, ET AL., PETITIONERS

v.

NATIONAL BITUMINOUS COAL COMMISSION, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL BITUMINOUS COAL COMMISSION IN OPPOSITION

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OPINIONS BELOW

No opinion was entered by the District Court. The opinion of the United States Court of Appeals for the District of Columbia, filed December 5, 1938, has not yet been reported.

JURISDICTION

The decree of the Court below was entered December 5, 1938. The petition for a writ of certiorari was filed December 16, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. May the National Bituminous Coal Commission introduce into evidence at price hearings held by it cost reports filed with its statistical bureaus by coal producers, pursuant to Commission Order No. 15, entered July 15, 1937, or are such reports confidential?

2. Is an order of the Commission directing its Secretary to permit parties to the cost hearings to inspect the cost reports subject to review in a court of equity?

3. Does the complaint herein contain sufficient allegations of irreparable injury?

STATUTE INVOLVED

The provisions of the Bituminous Coal Act of 1937 (50 Stat. 72–90, 15 U. S. C., § 828–851), primarily involved are Section 4–II (a), first paragraph, and Section 10 (a), which read as follows:

Section 4–II (a) (first paragraph):

> All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

Section 10 (a):

> The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission* or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

STATEMENT

On July 15, 1937, the National Bituminous Coal Commission issued its Order No. 15, requiring all producers of coal to file complete reports showing their total costs of production, pursuant to the authority conferred by Section 10 (a) of the Act. The Order contained a provision that—

> The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this order and further

> gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

Copies of this Order and of cost forms 1 and 1A were mailed by the Commission to each known producer within the United States (see Order No. 15, paragraph 3). The forms sent to producers with the Order contained the following statement in bold type:

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

On March 30, 1938, the Bituminous Coal Commission issued a Ruling in which it stated that it construed Section 10 (a) of the Act as permitting the introduction in evidence at hearings before the Commission of the cost data of the individual producers and that at the price-fixing hearings subsequently to be held the aforesaid cost data would be made available for introduction in evidence. On May 11, 1938, some of the petitioners herein filed a petititon with the Commission in which they moved the Commission to vacate the Ruling of March 30, 1938, just described, and to revoke the construction of the Act contained therein. On May 25 and 26, 1938, a hearing was held, both testimony and oral argument being heard by the Commission itself. On June 1 the Commission handed down an opinion and order in which it reaffirmed its former Ruling; it decided that Section 10 (a) of the Act authorized

disclosure of the reports in hearings and that in any event such disclosure was necessary to give the parties the full and fair hearing required by the Constitution.[1]

On June 6, petitioners before the Commission filed in the United States Court of Appeals for the District of Columbia their petition to review and set aside the Commission's order of June 1, 1938, under Section 6 (b) of the Bituminous Coal Act. On August 1, the court handed down its opinion holding that the order was not thus reviewable. *Mallory Coal Company* v. *National Bituminous Coal Commission*, 99 F. (2d) 399. On August 31 the Commission entered orders that its secretary make available for inspection in the western minimum price areas beginning on September 10 and in the eastern areas on September 15 the cost reports here involved. The reports were to be available only to "interested parties who have filed appearances in this proceeding" (R. 7–8). The hearing in the western areas was scheduled to begin on September 20; no definite date was set in the eastern areas.

On September 7 petitioners herein filed in the District Court for the District of Columbia their bill of complaint praying that the disclosure of the

[1] Before the Commission petitioners contended that the Act precluded disclosure of the cost reports; various consumers, on the other hand, argued that the Commission would be proceeding unconstitutionally if it did not disclose the reports.

information pursuant to the orders described above be enjoined (R. 2). The bill prayed for temporary and permanent injunctions and a declaratory judgment (R. 14–15). On September 8 appellees filed a motion to dismiss the bill of complaint (R. 16), and with the consent of the parties that motion and the motion for a temporary injunction were argued on the same day. On September 9 the District Court entered its order dismissing the bill for failure "to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act of 1937" (R. 18–19). The Commission agreed not to disclose the data in question pending application to the Court of Appeals for an injunction pending appeal. On September 14 that Court granted such an injunction against disclosure of the data pending final determination of the appeal.

On October 3, 1938, the case was argued in the Court of Appeals. On December 5th that Court entered an order affirming the judgment below dismissing the bill. On December 10th it entered a further order denying a petition for rehearing and granting a stay pending action by this Court, conditioned "upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within ten days."

ARGUMENT

I

THE COMMISSION IS AUTHORIZED TO INTRODUCE IN EVIDENCE COST DATA REPORTED BY PRODUCERS

The primary question raised in this case would seem to be conclusively determined by the language of Section 10 (a) of the Bituminous Coal Act. That Section provides that—

> The Commission may require reports from producers * * *. No information obtained from a producer disclosing *costs of production or sales realization* shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission or any court* and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

This plainly indicates that although cost data was to be kept confidential in so far as the public is concerned, the confidential status was subject to an exception with respect to use in evidence before the Commission or in a judicial proceeding.

Appellant has suggested that the above section should be construed so as to permit the disclosure of data in proceedings directed at a particular producer, but not the general use of reports in

hearings held during the price-fixing process. The language used by Congress is perfectly plain and unambiguous; it does not contain any such limitation. On the contrary, the exception in terms applies to "any hearing before the Commission."

It is significant in this connection that the corresponding exception in Section 10 (a) of the Bituminous Coal Conservation Act of 1935 (49 Stat. 991), provided that the information filed should not be made public "except where such disclosure is warranted by a controversy with the producer over any order of the Commission * * *." This exception had the precise meaning which the appellants seek to read into the 1937 Act. When Congress broadened the exception in the 1937 Act so as to include "any hearing," it must be assumed that it intended the new statute to have a different meaning from the old.

Appellants contend that the first paragraph of Section 4–II (a) of the Act precludes the use in evidence of cost data, and that that paragraph was intended by Congress to limit Section 10 (a). Section 4–II (a) requires "code members" (not all producers) to file such "information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require." That paragraph furthermore provides that "All such records shall be held by the statistical bureau as the confidential records of the code member filing such information."

But this paragraph has no application here. It applies only to code members. Section 10 (a) authorizes the Commission to require reports from all producers, and Order No. 15 applies to all producers. The bill of complaint concedes that Order No. 15 was issued "pursuant to authority conferred * * * by Section 10 (a)" (R. 9). The pledge of confidence in the order does no more than incorporate the provisions of Section 10 (not of Section 4–II (a)). The order recites:

> *Pursuant to authority conferred by Section 10 of said Act,* the Commission orders and directs as follows:
>
> 1. That each producer of bituminous coal, *whether or not a code member* and whether or not engaged in commerce in coal which is subject to the provisions of Section 4 of said Act, shall file, in duplicate, complete reports showing the total costs of the tonnage produced * * *.
>
> The Commission directs specific attention *to the provisions of Section 10 of said Act* relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced. [Italics supplied.]

It is thus plain from the Order itself that the data was required to be furnished pursuant to Section 10 (a) of the Act and not to Section 4–II (a).

Thus, even if Sections 4–II (a) and 10 (a) be regarded as conflicting, the latter would be the section applicable to the cost data here involved. We do not believe, however, that there is any conflict between the two sections here involved. The first paragraph of Section 4–II (a) was concerned with the functioning of the statistical bureaus. The paragraph provided that the records were to be kept confidential "by the statistical bureaus." They were not to be revealed to the curious or to competitors seeking to pry into each other's affairs. There is no indication, however, that this section was intended to deal with the problem of whether the confidential nature of the records was to preclude their use in hearings before the Commission or in court. Section 4–II (a) certainly does not state in express language that the data could not be so used. Any negative inference to that effect which might arise if the statute were otherwise silent is dispelled by the specific language of Section 10 (a) permitting the use of cost data in hearings. The latter section, which applies to all producers, code members and non-code members alike, is the all-inclusive section.

The District Court, in its order dismissing the bill of complaint, correctly held that the acts sought to be enjoined were authorized by and not in violation of the statute.

If there be any doubt as to the proper construction of the Act, the Court should give great weight

to the construction adopted by the agency charged with the task of administering it. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. Injunctions which will interfere with the administration of a statute should not be granted unless the conduct to be restrained is clearly arbitrary and illegal. This was the view taken by the Court of Appeals. It regarded the statute as ambiguous, holding that although it may be argued that Section 4 (a) of the Act requires the cost data be kept secret, "it may be just as persuasively argued that the provisions of Section 10 (a) permit the introduction of such material into evidence at any hearing before the Commission." Under such circumstances it was clearly correct in refusing to enjoin the Commission's action.

One factor which induced the Commission to construe the statute the way it did was the desire to avoid any question as to the constitutionality of its procedure. An administrative body should be given the benefit of all doubts when it is endeavoring to construe a law so as to give the parties concerned the fairest possible hearing.

II

THE COURT OF APPEALS CORRECTLY HELD THAT THE COMMISSION'S DETERMINATION WAS NOT REVIEWABLE IN EQUITY; ITS DECISION DOES NOT CONFLICT WITH THAT OF THIS COURT IN *SHIELDS* v. *UTAH-IDAHO CENTRAL RAILROAD COMPANY*

The action of the Commission involved in this case relates to the introduction in evidence of ma-

terial in the possession of the Commission. In this suit petitioners are seeking to have the courts review the Commission's ruling in the middle of the administrative proceeding and to restrain the Commission from proceeding until the evidentiary question is first determined. The Court of Appeals held that such procedural matters were not reviewable in a suit for an injunction even though no other method of review was available. As the Court stated:

> To permit judicial review, either by injunction or by declaratory judgment, of every procedural, preliminary, and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings and would render orderly administrative procedure impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies. That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regrettable but not controlling factor under such circumstances. Injury may result also from judicial determinations and from direct legislative action. "* * * the expense and annoyance of litigation is 'part of the social burden of living under government.'"

This is especially true where the injury complained of consists solely of the disclosure of information in evidence. Such injury is plainly part of the social burden of living under government.

Moreover, this case itself is a perfect example of the way in which judicial review of procedural matters affords opportunity for "constant delays" in administrative proceedings. Here, although no court has held the Commission's action improper, the Commission has already been impeded from June to December by the petitioners' attempts to have this preliminary question settled in the courts.

There is ample precedent for holding that such matters are not reviewable. Compare *United States* v. *Illinois Central R. R.*, 244 U. S. 82; *United States* v. *Los Angeles & Salt Lake R. R.*, 273 U. S. 299; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375. Although these decisions turned in part upon the meaning of the word "order" in the statute providing for judicial review, their reasoning that preliminary procedural matters cannot be reviewed by the courts if administrative actiton is to be effective is plainly applicable to the ordinary suit for injunction.

Petitioners claim that the decision below is inconsistent with that of this Court in *Shields* v. *Utah-Idaho Central Railroad Company*, October Term, 1938, No. 28, rendered on the same day. In the *Shields* case this Court held that a finding of fact by the Interstate Commerce Commission,

though not an order reviewable under the Urgent Deficiencies Act, could be judicially reviewed in an equity suit against a United States Attorney threatening criminal action on the basis of the Commission's decision. The case thus indicates that *some* determinations of the Interstate Commerce Commission, not reviewable under the Urgent Deficiencies Act, may be reviewed in an ordinary equity suit.

But in that case the Commission's determination was final; it conclusively determined whether the carrier was exempt from the Railway Labor Act or subject to its terms. No further administrative procedure was called for or possible, and no statutory plan for judicial review was available.

This case on the contrary is concerned with a ruling of the Commission relating to the admission of evidence—a preliminary procedural order, as the court below pointed out. In the *Shields* case the Court declared that, "The nature of the determination points to the propriety of judicial review," and then went on to show that the determination was an important and substantive part of the regulatory scheme. That is not true in the case at bar.

III

THE COMPLAINT DOES NOT ADEQUATELY ALLEGE IRREPARABLE INJURY

The only specific allegations of injury[2] contained in the complaint (Paragraph 15) are that disclosure of costs will cause consumers to demand lower prices, and that the high cost producers will lose business to low cost producers and have their credit standing impaired. There is no allegation that any of the petitioners are high cost producers. These allegations are purely speculative and conjectural. Obviously the cost reports of all producers are to be disclosed at the same time, not merely those of petitioners. We do not believe these allegations make a sufficient showing of irreparable injury to warrant the granting of injunctive relief.[3]

CONCLUSION

The decisions below do not conflict with the decisions of any other court or of this Court. They are correct both on the merits and on the jurisdictional question. The lack of sufficient allegations of irreparable injury might prevent this Court

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[2] The general allegations that there will be "great prejudice" and "irreparable injury" to petitioners are, of course, mere conclusions not admitted by the motion to dismiss.

[3] Although the failure of the complaint adequately to allege irreparable injury was not argued in the courts below, it is raised by respondents' motion to dismiss (Paragraphs 4 and 7).

from having to decide the other questions raised. The petition for certiorari should be denied.

If the Court should grant the petition for certiorari, the respondents respectfully request that the case be set down for argument in January. Further delay in the determination of the question here raised will seriously interfere with the work of the National Bituminous Coal Commission and greatly impair the functioning of the Bituminous Coal Act.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ROBERT L. STERN,
Special Assistant to the Attorney General.
ROBERT W. KNOX,
General Counsel,
National Bituminous Coal Commission.

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No. 528

In the Supreme Court of the United States

OCTOBER TERM, 1938

UTAH FUEL COMPANY ET AL., PETITIONERS

v.

NATIONAL BITUMINOUS COAL COMMISSION ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL BITUMINOUS COAL COMMISSION

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OPINIONS BELOW

No opinion was entered by the District Court. The opinion of the United States Court of Appeals (R. 23–32) for the District of Columbia, filed December 5, 1938, has not yet been reported.

JURISDICTION

The decree of the Court below was entered December 5, 1938. The petition for a writ certiorari was filed December 16, 1938, and granted December 19, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. May the National Bituminous Coal Commission introduce into evidence at price hearings held by it cost reports filed with its statistical bureaus by coal producers, pursuant to Commission Order No. 15, entered July 15, 1937, or are such reports confidential?

2. Has a district court jurisdiction to enjoin the Commission from permitting disclosure in evidence in its hearings of alleged confidential information?

STATUTE INVOLVED

The provisions of the Bituminous Coal Act of 1937 (50 Stat. 72-90, 15 U. S. C., §§ 828-851), primarily involved are Section 4-II (a), first paragraph, and Section 10 (a), which read as follows:

Section 4-II (a) (first paragraph):

> All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

Section 10 (a):

> The Commission may require reports from producers and may use such other sources of

> information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission* or any court, and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

The pertinent provisions of the Bituminous Coal Act are set forth in the Appendix to this brief, *infra*, pp. 48–60.

STATEMENT

On July 15, 1937, the National Bituminous Coal Commission issued its Order No. 15,[1] requiring all producers of coal to file complete reports showing their total costs of production, pursuant to the authority conferred by Section 10 (a) of the Act. The Order contained a provision that—

> The Commission directs specific attention to the provisions of Section 10 of said Act

[1] For the convenience of the Court, Order No. 15 has been printed in full in the Appendix to this brief, *infra*, pp. 37–39. The order is printed in 2 *Fed. Register* 1234.

> relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

Copies of this Order and of cost forms 1 and 1A were mailed by the Commission to each known producer within the United States (see Order No. 15, paragraph 3, *infra*, p. 38). The forms sent to producers with the Order contained the following statement in bold type:

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

On March 30, 1938, the Bituminous Coal Commission issued a Ruling in which it stated that it construed Section 10 (a) of the Act as permitting the introduction in evidence at hearings before the Commission of the cost data of the individual producers and that at the price-fixing hearings subsequently to be held the aforesaid cost data would be made available for introduction in evidence (3 Fed. Register 807). On May 11, 1938, some of the petitioners herein filed a petition with the Commission in which they moved the Commission to vacate the Ruling of March 30, 1938, just described, and to revoke the construction of the Act contained therein. Various producers and consumers sought to intervene in the proceeding thus instituted, the producers supporting the petition filed. The consuming interests, including the Consumers' Counsel established by the statute to represent con-

sumers, argued that any prices fixed would be invalid if the cost data upon which they were based were not revealed to parties to the proceeding.[2]

On May 25 and 26, 1938, a hearing was held, both testimony and oral argument being heard by the Commission itself. On June 1 the Commission handed down an opinion[3] and order (3 Fed. Register 1277) in which it reaffirmed its former Ruling. It decided that Section 10 (a) of the Act authorized disclosure of the reports in hearings, and that in any event such disclosure was necessary to give the parties the full and fair hearing required by the statute and the Constitution.[4] On

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[2] The Commission permitted all the parties seeking to intervene to appear, offer evidence, and participate in the argument at the hearing. It subsequently granted the petitions for leave to intervene filed by producers and municipal corporations, but denied the petitions filed by other consumers. Some of these consumers and the Consumers' Counsel appeared as *amici curiae* in support of the Commission's position in the lower courts, and we understand that certain of the consumers are filing a brief *amici curiae* in this Court.

[3] The opinion is printed in the Appendix, infra, pp. 39–48.

[4] In answer to the argument, renewed here (Petitioner's brief, pp. 71–72), that the Commission makes only a mathematical computation from the cost reports, the Commission found (p. 43, *infra*):

"* * * On the contrary, it appears from the testimony of the representative of the Statistical Division of the Commission that in determining whether certain of the Cost Forms should be returned to producers for correction because of out-of-line or missing items, or in determining whether to accept the cost items as reported, the exercise of judgment and the application of sound statistical practices were employed."

June 1 the Commission issued its order denying the petition and directing the secretary of the Commission (R. 6)—

> to cause the individual cost reports of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required.

On June 6, petitioners before the Commission filed in the United States Court of Appeals for the District of Columbia their petition to review and set aside the Commission's order of June 1, 1938, under Section 6 (b) of the Bituminous Coal Act. The case was argued in the Court of Appeals on June 15. On August 1, the court handed down its opinion holding that the order was not thus reviewable. *Mallory Coal Company* v. *National Bituminous Coal Commission,* 99 F. (2d) 399.

After receiving this decision, the Commission on August 31 entered orders that its secretary make available for inspection for the western minimum price areas beginning on September 10 and for the eastern areas on September 15 the cost reports here involved.[5] The reports were to be available only

[5] The order with respect to the western areas read as follows (R. 7–8):

"1. That the Secretary of the Commission be, and he is hereby, directed to cause the verified cost reports of the individual producers within each of Minimum Price Areas 6, 7,

to "interested parties who have filed appearances in this proceeding" (R. 7–8). The hearing for the western areas was scheduled to begin on September 20; no definite date was set for the eastern areas.

On September 7 petitioners herein filed in the District Court for the District of Columbia their bill of complaint praying that the disclosure of the information pursuant to the orders described above be enjoined (R. 2). The bill prayed for temporary and permanent injunctions and a declaratory judgment (R. 14–15). On September 8 respondents filed a motion to dismiss the bill of complaint (R. 16),[6] and with the consent of the parties that mo-

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9, and 10, submitted to the Commission pursuant to Orders Nos. 15 and 29, to be made available for inspection during business hours on and after September 10th, 1938, at the offices of the Commission, Central Savings Bank Building, Denver, Colorado, by those interested parties who have filed appearances in this proceeding. Notices of appearance may be filed with the Commission at the Secretary's Office, Washington, D. C., or at the Offices of the Commission, Central Savings Bank Building, Denver, Colorado.

"2. The hearing in the matter of the determination of the weighted average of the total costs per net ton of the tonnage produced in Minimum Price Areas 6, 7, 9, and 10 is hereby reopened and notice is hereby given that the Commission will, on the 20th day of September, 1938, at 10:00 A. M. in its hearing room in the Albany Hotel, Denver, Colorado, afford all interested parties further opportunity to introduce affirmative evidence and to cross-examine witnesses as to the correctness of said composite reports heretofore introduced in evidence in this proceeding."

[6] Although the motion to dismiss suggested various other grounds for dismissal, the Commission argued only the merits of the case—the question of statutory construction—in both the District Court and the Court of Appeals.

tion and the motion for a temporary injunction were argued on that day. The District Court upheld the Commission's contention on the merits, and on September 9 entered its order dismissing the bill for failure "to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act of 1937" (R. 18–19). The Commission agreed not to disclose the data in question pending application to the Court of Appeals for an injunction pending appeal. On September 14 that court granted such an injunction against disclosure of the data pending final determination of the appeal.

On October 3, 1938, the case was argued in the Court of Appeals. On December 5th that court handed down its opinion (R. 23–32), in which it held that the question of the District Court's jurisdiction could not be waived (R. 24), that the court had no jurisdiction, and in addition that "the statute being ambiguous and the construction placed thereon by the Commission being a possible one, injunctive relief at this time is not a proper remedy in any event" (R. 29). On December 10th it entered a further order denying a petition for rehearing and granting a stay pending action by this Court, conditioned "upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within ten days" (R. 33). On December 16th, both the petition for certiorari and the

brief in opposition were filed. On December 19th this Court granted certiorari and an injunction against disclosure pending final determination of the proceeding here.

SUMMARY OF ARGUMENT

I. Section 10 (a) of the Bituminous Coal Act in express terms permits disclosure of cost data in evidence in hearings before the Commission. This plain language must be construed to mean what it says. Section 4–II (a) of the Act, which also contains a pledge of confidence but without the exception relating to the use of reports in evidence, is not applicable to the reports here involved, since they were filed pursuant to an order expressly issued under Section 10 (a).

In any event that Section is not inconsistent with Section 10 (a). Its purpose was to prevent indiscriminate disclosure of the data by the Statistical Bureaus or other employees of the Commission. Section 4–II (a) was not intended to give greater protection to cost reports than to the records upon which such reports are based, and these records themselves would be subject to the Commission's power to subpoena them for introduction in evidence in hearings.

Petitioners' arguments that Section 10 (a) should be restricted in meaning to cost reports not filed for use in the fixing of minimum prices is inconsistent with its plain meaning, with the scope of Section 10 viewed as a whole, and with its legisla-

tive history. The effect of the argument would be to exclude from the scope of Section 10 the very information it was primarily designed to protect.

Although it was the purpose of Congress to preserve the secrecy of the reports insofar as was consistent with the effective administration of the Act, Congress also intended the Commission to act solely on the basis of evidence adduced in hearings. These policies are reconciled in Section 10 (a), which excepts use of the data in evidence from the statutory guarantee of confidence.

If there be any doubt as to the proper construction of the Act, the Court should give great weight to the construction adopted by the agency charged with the task of administering it. Particularly should this be the case when an administrative body is endeavoring to construe a statute so as to avoid any attack on the validity of its procedure.

II. The question of the jurisdiction of the District Court is submitted upon the basis of the opinion of the Court of Appeals. The policy of preventing the district courts from interrupting administrative proceedings through injunctions restraining the introduction of evidence, particularly where there is a statute granting the circuit courts of appeals exclusive jurisdiction to set aside administrative orders, should cause the Court carefully to scrutinize the allegations of irreparable injury upon which injunctive relief is sought to be justified. An examination of these allegations here

will demonstrate that the injury is remote, speculative, and conjectural.

ARGUMENT

I

THE ACTS OF THE COMMISSION SOUGHT TO BE ENJOINED ARE AUTHORIZED BY AND NOT IN VIOLATION OF THE STATUTE

A. The Commission is authorized to introduce in evidence cost data reported by producers

Section 2 (a) of the Bituminous Coal Act of 1937 provides in part that—

> No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States.

Section 10 (a), the provision which is here controlling, declares that—

> The Commission may require reports from producers * * *. No information obtained from a producer disclosing *costs of production or sales realization* shall be made public without the consent of the pro-

> ducer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission or any court,* and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

These two sections together plainly indicate that the Commission's determinations are to be based upon hearings, and that although certain information is generally to be kept confidential, its confidential status shall not prevent its use in evidence in Commission hearings.

Despite petitioners' characterization of the exception in Section 10 (a) as "vague" (Petitioners' brief, p. 39), we can conceive of no language which would more clearly express the intention of Congress. When the words of a statute "are plain, there is no room for construction." *Osaka Shosen Line* v. *United States,* 300 U. S. 98, 101; *United States* v. *Missouri Pac. R. Co.,* 278 U. S. 269, 277–278; *United States* v. *Wiltberger,* 5 Wheat. 76, 95–96; *cf. Wallace* v. *Cutten,* 298 U. S. 229.

Petitioners, however, contend that the first paragraph of Section 4–II (a) of the Act, *infra,* p. 49, precludes the use in evidence of the cost data here involved. Section 4–II (a) requires "code members" (not all producers) to file such "information concerning the preparation, cost, sale, and distribu-

tion of coal as the Commission may authorize or require." That paragraph furthermore provides that "All such records shall be held by the statistical bureau as the confidential records of the code member filing such information."

Order No. 15 was issued under Section 10 (a), not Section 4–II (a).—The first answer to the contention is that Section 4–II (a) is irrelevant, because Order No. 15, under which the material sought to be disclosed was secured, was issued solely under Section 10 (a). Section 4–II (a) applies only to code members. Section 10 (a) authorizes the Commission to require reports from all producers, and Order No. 15 applies to all producers. The bill of complaint concedes that Order No. 15 recites that it was issued "pursuant to authority conferred * * * by Section 10 (a)" (R. 9). The pledge of confidence in the order does no more than incorporate the provisions of Section 10 (not of Section 4–II (a)). The order is specific. It recites (see p. 37, *infra*):

> * * * *pursuant to authority conferred by Section 10 of said Act,* the Commission orders and directs as follows:
>
> 1. That each producer of bituminous coal, *whether or not a code member* and whether or not engaged in commerce in coal which is subject to the provisions of Section 4 of said Act, shall file, in duplicate, complete reports showing the total costs of the tonnage produced * * *.

> The Commission directs specific attention *to the provisions of Section 10 of said Act* relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced. [Italics supplied.]

It is thus plain from the Order itself that the data was required to be furnished pursuant to Section 10 (a) of the Act, and not to Section 4–II (a).

Sections 10 (a) and 4–II (a) are not inconsistent.—The second answer to the contention is that even if Section 4–II (a) is relevant, it is not in conflict with, or more restrictive than, Section 10 (a). The first paragraph of Section 4–II (a) is concerned with the functioning of the statistical bureaus. The paragraph provides that the records are to be kept confidential "by the statistical bureaus." They are not to be revealed to the curious or to competitors seeking to pry into each other's affairs. This section does not attempt, however, to deal with the problem of whether the confidential nature of the records was to preclude their use in hearings before the Commission or in court. Section 4–II (a) certainly does not state in express language that the data could not be so used. Any negative inference to that effect which might arise if the statute were otherwise silent is dispelled by the specific language of Section 10 (a) permitting the use of cost data in hearings. The

latter section, which applies to all producers, code members and non-code members alike, is the all-inclusive section.

That such is the case is apparent if the nature of the statutory guarantee of secrecy is considered. Section 4–II (a) nowhere provides that producers' costs may not be disclosed. At most, even accepting petitioners' arguments as valid, the *cost reports* are to be kept confidential. The Commission has power under Section 8 of the Act to subpoena any documents pertinent to its hearings;[7] it could thus subpoena the original books of petitioners for the purpose of discovering their costs, if the cost reports were not available. The costs themselves are clearly not "trade secrets" or property rights immune from process. *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission,* 6 F. (2d) 491, 495. *Cf. Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294. Petitioners would have had no ground for refusing to produce them if they had been subpoenaed for use in the cost proceedings.[8]

The purpose of the statutory pledge of confidence was to assure producers that the cost infor-

[7] The Commission's subpoenas are enforceable in the District Courts. Section 8.

[8] The relevance of such information in proceedings in which the Commission is seeking to determine the weighted average cost of production cannot be questioned. Plainly, however, it is unnecessary for the Commission to introduce the original records in evidence in determining weighted average costs.

mation filed with the Commission would not indiscriminately be made public, and that it would thus have the same privacy as the producers' own books. But it obviously was not intended that the reports filed be protected to a greater extent than the records from which they were taken. Since the Commission, under the Act, unquestionably possesses power to require production of the records (although it certainly need not do so, see footnote 8, p. 15, *supra*), it would be unreasonable to assume that Congress intended to forbid use of the reports in evidence. Congress avoided such an unreasonable limitation by Section 10 (a).

Petitioner's argument that Section 4–II (a) is nullified if the cost reports may be disclosed in evidence at cost hearings under Section 10 (a) is groundless. That section has substantive value if construed to prevent disclosure to favored persons by statistical bureaus or other Commission employees. So construed the section prohibits disclosure of individual producers' reports arbitrarily and thus prevents giving one producer a discriminatory advantage over his competitor. When the reports of all are disclosed simultaneously in hearings no such advantage exists. Moreover, the disclosure in hearings is only to parties to the proceeding (see p. 29, *infra*). Although all consumers [9] might seek to appear at such hearings, only a few, of course, will actually do so.

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[9] Petitioners alleges that injury will result from disclosure to consumers (R. 12–13). See p. 34, *infra*.

Petitioners' arguments are inconsistent with the plain meaning of Section 10 (a).—Petitioners' argument is that Section 4–II (a) is inconsistent with a literal construction of Section 10 (a), and that if the two are read together Section 10 (a) must be regarded as limited to "reports containing information that the Commission may require in order to carry out its duties under the Act, other than its price fixing duties" (Petitioners' brief, p. 45). The argument, put another way, is that petitioners are code members, that Section 4–II (a) establishes the rules governing code members, and that Section 10 (a) cannot be construed as applying to any of the obligations of producers as code members. It is further argued that although the Commission purported to act under Section 10 (a), it had no authority to do so in so far as petitioners are concerned; that the Commission's order could rest only on Section 4–II (a); and that accordingly the reports must be treated as if petitioners had filed them under the latter section instead of the former.

There are many answers to these arguments, but the primary one is that they are inconsistent with the plain meaning of Section 10 (a). That section in terms refers to "producers," and the guarantee of confidence subject to stated exceptions is a guarantee to *producers,* without any of the qualifications or limitations petitioners seek to read into it. "Producer" is defined in Section 17 (c) of the Act as including "*all* individuals, firms, associations,

corporations, trustees, and receivers engaged in the business of mining coal." [Italics supplied.] "Code members" are defined in Section 4 of the Act as meaning "producers accepting membership in the code." Thus Section 10 (a) applies to all producers of coal, including code members. If Congress had intended that section to have as narrow a meaning as that suggested by petitioners, it could easily have limited the section to non-code members, or to reports filed only in administering other parts of the Act than the code set forth in Section 4. Petitioners are here seeking to have the courts read into the statute limitations which Congress did not provide.

The broad scope of Section 10 (a) is shown by an examination of Section 10 as a whole.—A reading of Section 10 as a whole demonstrates clearly that Congress intended it to apply to all reports filed under the Act. The three subdivisions of the section considered together provide a complete system of regulation and enforcement with respect to the reports necessary to the administration of the statute. The first sentence of Section 10 (a) authorizes the Commission to "require reports from producers," and to "require producers to maintain a uniform system of accounting of costs" and other items "as may be required *in the administration of this Act.*" [Italics supplied.] This language indicates that Section 10 (a) was not intended to be limited in scope to those parts of the Act not em-

bodied in the code, as would be the case if petitioners' interpretation were accepted. Section 10 (b) imposes criminal penalties on any officer or employee of the Commission who discloses any information in violation of Section 10 (a). No other section of the Act provides for such penalties. If petitioners' construction of Section 10 were correct, these penalties would not apply to disclosures of cost data to be used in the price fixing process (the data here involved), although there can be no doubt that those were the reports primarily to be protected. Section 10 (c) provides for the forfeiture of fifty dollars a day "if any producers required *by this Act or the code or regulation made thereunder*" [italics supplied] shall fail to file a report. This provision in terms applies to all reports which the Commission may require to be filed, whether under the code or any other part of the statute. It cannot seriously be argued that while the first sentence of subdivision (a) of Section 10 and all of subdivisions (b) and (c) are of general application, Congress intended the second sentence of subdivision (a)—or at least the exception therein here under consideration—to be so limited in scope as to exclude reports used in the fixing of minimum prices.

If this were not otherwise clear it would be manifest from the fact that the most important duty of the Commission under the Act is the fixing of minimum prices. Most of the statute either provides

for or is ancillary to the machinery established for the fixing of such prices. Most reports which have been and will be required under the Act relate to the fixing of such prices. Petitioners have exercised ingenuity [10] in thinking of other possible instances in which cost reports *might* be required; but it is nevertheless obvious, looking at the statute as a whole, that the "information disclosing costs" referred to in Section 10 (a) was primarily intended to mean the cost data filed for use in the establishment of minimum prices.

In fixing minimum prices the Commission must obtain cost reports both from code members and non-code members.—An assumption implicit in petitioners' argument is that only the cost reports of code members need be required by the Commission for the fixing of minimum prices, inasmuch as only code members are bound by the prices established. But this assumption is inconsistent with

[10] See petitioners' brief, pp. 42, 45. The instances suggested where cost reports might conceivably be disclosed all arise under the code (see petitioners' brief, p. 42). If Section 10 (a) authorizes disclosure of reports in hearings held under other portions of the code, it is difficult to see why the section should not also apply to the minimum price provisions. On p. 45 of their brief petitioners have sought to enumerate duties of the Commission outside of the code for which cost reports might be required. It is apparent from petitioners' own statement of these duties that there would be no possible occasion for disclosure of *individual cost reports* in hearings held with respect to any of them. The exception in Section 10 (a) would have had no purpose if limited to such reports.

the very first step in the price-fixing process. The seventh paragraph of Section 4–II (a) provides that "As soon as possible after its creation each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the *ascertainable* tonnage produced in the district in the calendar year 1936." [Italics supplied.] The "ascertainable" tonnage plainly includes that of non-code members as well as of code members. In order that the average costs of the ascertainable tonnage may be determined, cost reports must be obtained both from non-code members and code members.[11]

It was thus necessary that the Commission's order requiring the filing of reports to serve as the basis for the determination of the weighted average cost apply to all producers, and it could only apply to all if it were issued under Section 10 (a). Accordingly, Order No. 15 was issued pursuant to that section. It follows not only that Section 10 (a) does apply to reports used in the fixing of prices but that it *must* apply to the very kind of re-

[11] Not all producers joined the code at once; many acceptances were filed after July 1937, and some are still coming in. If prices were to be based on the average costs of code members only, they would have to be continually revised as code membership changed. Moreover, basing the prices to be fixed on the broadest possible foundation, regardless of code membership, was obviously fair. The wisdom of Congress in providing that average costs should be based on the *ascertainable* tonnage rather than on that of code members is thus amply demonstrated.

ports here involved.[12] The basic premise of petitioner's argument thus falls to the ground.

The legislative history of Section 10 (a) supports the Commission's construction.—That Congress carefully considered the problem raised by the exception to Section 10 (a) here involved is demonstrated by the legislative history of the provision. Section 10 (a) of the Bituminous Coal Act of 1937 is, with one change of great significance, identical with Section 10 (a) of the Bituminous Coal Conservation Act of 1935 (49 Stat. 1005–1006), the act upon which the 1937 statute was largely modeled.[13] The only change made is in the first exception to the requirement that informa-

[12] Petitioners are thus incorrect in arguing (Petitioners' brief, p. 46) that Section 10 (a) could be excised from the statute without interfering with the performance of the Commission's duties under Section 4.

[13] Section 10 (a) of the Bituminous Coal Conservation Act of 1935 read as follows (49 Stat. 991, 1005–1006):

"The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is warranted by a controversy with the producer over any order of the Commission and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission."

tion disclosing costs of production shall not be made public—the very exception here in issue. In the 1935 Act no such information could be made public "except where such disclosure is warranted by a controversy with the producer over any order of the Commission." In the 1937 Act the exception was broadened so as to permit disclosure "in evidence in any hearing before the Commission or any court"—a change which shows that Congress was aware of the necessity of preventing the statutory provisions for secrecy from interfering with the Commission's power to hold full and fair hearings.

That this was the intention of Congress is confirmed by the language of the report of the House Committee on Ways and Means (H. R. Rep. 294, 75th Cong., 1st Sess.). That report stated (p. 8) with respect to Section 10 (a) that—

> Section 10 (a) gives the Commission power to require reports from producers and to require them to maintain a uniform system of accounting of costs, wages, and other matters. Information obtained from the producer which relates to cost and sales realization is to be confidential, and *may be disclosed only with the consent of the producer or in evidence in a hearing before the Commission or a court.* [Italics supplied.]

It should be noted that this statement nowhere indicates that Section 10 (a) is to be given the narrow construction proposed by petitioners here. It is

furthermore significant that the above passage is the only reference to the confidential nature of the cost data in the Committee Reports on the Act;[14] the Committee Reports do not mention the provision in Section 4–II (a) upon which petitioners rely.

Petitioners argued below that Section 10 (a) should still be construed as authorizing disclosure only in connection with a controversy with the particular producer whose reports were to be disclosed. This argument, of course, would give the exception in the 1937 Act the same meaning as that in the 1935 Act, and would nullify the significant change in the language used. Petitioners now renew the argument in slightly different form (Petitioners' brief, pp. 41–42), and suggest that in the 1935 Act disclosure could only be made after the Commission had issued an order, and that the purpose of the change in the 1937 Act was to authorize "disclosure of a cost report of a particular producer prior to the issuance by the Commission of any order, but still only where there was a controversy with such producer." If the purpose of Congress in revising the exception had been merely to extend it to controversies with particular producers before the entry of an order, much narrower language than "in *any* hearing before the Commission" would have been employed. The exception in the 1937 Act

[14] See H. R. Reps. 294, 578 (Conference Report), S. Rep. 252, 75th Cong., 1st Sess.

simply will not bear the construction put upon it by petitioners. This argument, like the others, tries to read into the statutory provision limitations which are not there.

The purposes of Congress.—Petitioners assert that the statute "fairly breathes secrecy" (Petitioners' brief, p. 52) and that Congress intended that the cost reports should never be disclosed in the course of the price-fixing process. There can be no dispute that Congress intended to protect the confidential character of the reports so far as that protection was consistent with the administration of the Act. But an even more important purpose of Congress was that the determinations of the Commission as to fair minimum prices should be based upon evidence introduced at hearings. Section 4–II (a) reflects the subordinate purpose of Congress to give a qualified protection to the confidential character of the reports; Section 2 (a) manifests the primary intention of Congress that the Commission should base its decision on evidence adduced at hearings. Section 10 (a), as amended (see pp. 22–23, *supra*), recognizes both purposes and expressly provides for their reconciliation. It repeats the qualified pledge of confidence but expressly declares that it does not extend to disclosures "made in evidence at any hearing before the Commission." The effect of this section is to clothe the Commission with authority to make any use of the reports in connection with a hearing

which is not inconsistent with the requirement that the hearing be fair and which, in the informed judgment of the Commission, is appropriate or necessary in order that the record of the hearing may provide an adequate basis for the Commission's action.

Effect of administrative interpretation.—If there be any doubt as to the proper construction of the Act, the Court should give great weight to the construction adopted by the agency charged with the task of administering it. As this Court declared in *Brewster* v. *Gage,* 280 U. S. 327, 336:

> It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. *Logan* v. *Davis,* 233 U. S. 613, 627. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 349. *Swendig* v. *Washington Water Power Co.,* 265 U. S. 322, 331.

See also *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315. Particularly should this be the case when an administrative body is endeavoring to construe a statute so as to avoid any attack on the validity of its procedure. Under such circumstances injunctions which will interfere with the administration of a statute should not be granted unless the conduct to be restrained is clearly arbitrary and illegal.

B. The Commission was authorized to make the cost data available for inspection by interested parties

The argument in Point I–A demonstrates that the Commission was authorized by the statute to introduce the cost data in evidence. Petitioners argue that even if this is the case the Commission's orders nevertheless are unauthorized because they provide that the individual cost returns of the petitioners will "be made available for inspection by those interested parties who have filed appearances in this proceeding" (R. 7–8).[15]

The question of whether if the reports may be introduced in evidence they may instead be inspected by the parties to the proceeding does not relate to substance but to form. If the cost reports are introduced into evidence they may be examined by the whole world and not merely by interested parties. Petitioners could not seriously and do not in fact contend that they would be injured any more if the reports were made available for inspection by the parties than if they were introduced in evidence. It was presumably for this

[15] The proceeding referred to is the fixing of minimum prices. This is docketed by the Commission as one proceeding, hearings being held *seriatim* with respect to various phases of the process. Hearings relating to the weighted average cost of production have been held, and all the Commission's evidence introduced except the data in question here. The orders of August 31 provide that parties to the proceeding may inspect the cost reports before the taking of testimony is resumed.

reason that petitioners apparently abandoned this argument in the Court of Appeals.

The Commission's opinion states that over 90,000 cost forms had been filed for the years 1936 and 1937. See p. 42, *infra*. The usual method of putting such a mass of material into evidence is to have an expert summarize and compile it in appropriate form and then permit the parties to the proceeding to inspect the original data. *Wigmore on Evidence*, Sec. 1230 (2d ed.); *Berthold-Jennings Lumber Company* v. *St. Louis I. M. & S. Ry. Co.*, 80 F. (2d) 32 (C. C. A. 8th); *Paschen* v. *United States*, 70 F. (2d) 491, 501 (C. C. A. 7th); *Elmer Company* v. *Kemp*, 67 F. (2d) 948, 950 (C. C. A. 9th); *Equitable Life Assurance Society* v. *Sieg*, 53 F. (2d) 318, 319–320 (C. C. A. 6th); *Butler* v. *United States*, 53 F. (2d) 800, 805 (C. C. A. 10th); *Northern Pacific Ry. Co.* v. *Keys*, 91 Fed. 47, 58 (C. C. N. D.).

To avoid encumbering the record with 90,000 forms, the Commission proposed to introduce compilations of the data contained in the forms, and to give the parties to the proceeding an opportunity to examine the originals and to offer them in evidence if they so desire.[16] The Commission could have formally introduced all of the 90,000 reports in evidence and then adjourned the hearing so as to give the parties time to examine them. Instead, it ad-

[16] The Commission has already introduced the compilations in evidence. The hearing is being held open to permit inspection of the reports and cross-examination based upon them.

journed the hearing temporarily first and proposed to permit inspection of the reports by the parties before the hearing was resumed. The result of this reasonable procedure will be to minimize the publicity given the reports, since it may be that many of them will not be formally introduced in evidence. The procedure follows that approved by this Court in *United States ex rel. St. Louis, S. W. Ry. Co.* v. *Interstate Commerce Commission,* 264 U. S. 64, 78–79; it saves time, keeps the record down to a size which is susceptible of being examined, and protects petitioner's rights to the greatest possible degree.

The Commission's orders do not open the cost data to a general inspection; they are strictly limited to "those interested parties who have filed appearances in this proceeding" (R. 7–8). We think that the Congress which authorized the introduction into evidence at hearings of the original reports intended that this more sensible procedure also be available to the Commission, and that Section 10 (a) should be construed accordingly. As the Commission stated in its opinion—

> making available for inspection the underlying cost data to test the accuracy of composite exhibits, which are a summary of the items contained on the Cost Forms, is in effect introducing the underlying data in evidence without unduly encumbering the record.

It is, of course, immaterial whether the inspection takes place in the hearing room, before or after formal introduction of the reports in evidence, or

in more convenient quarters during a temporary adjournment of the hearing. The latter is the course adopted by the Commission in order to avoid a considerable waste of time. Whichever course is pursued, the inspection should properly be regarded as a part of the hearing itself. Under such circumstances the disclosure would seem to be "made in evidence in [a] hearing before the Commission" within the meaning of Section 10 (a) of the Act. It would not be reasonable to impute to Congress an intention to preclude the Commission from permitting a limited number of interested parties from examining the data as a preliminary step to the introduction of compilations at a hearing, while at the same time allowing the Commission to adopt the impracticable course of introducing the original material itself into evidence, thereby making the material open to the whole world.

For these reasons the construction of the statute adopted by the Commission should be approved by this Court.

In any event, if the Commission has power under the Act to put the reports in evidence, petitioners can suffer no injury, irreparable or otherwise, from disclosure in the manner provided. The bill complains of injury from disclosure, not from inspection.

C. The Commission is not estopped from disclosing in hearings the cost data obtained from producers

Petitioners' argument suggests that the Commission induced petitioners to believe that the cost reports filed under Order No. 15 would be kept entirely confidential.

The provisions in Order No. 15 upon which petitioners rely is the statement that (R. 9)—

> The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this Order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

This statement itself, as well as other portions of Order No. 15 quoted *infra,* p. 37, demonstrates that the data was obtained pursuant to the provisions of Section 10, and accordingly cannot be regarded as making the reports any more confidential than does that section.

Petitioners also rely upon the statement at the top of the cost forms (R. 9–10) that—

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

This statement also makes it plain that the confidential character of the reports is based upon the statute. No producer would be warranted upon the basis of such a statement in assuming that the guarantee of secrecy was any broader in scope than the statutory provision upon which it was based. In any event the cost forms were distributed to producers along with copies of Order No. 15 (R.

9), and the above language in the Form must be read in connection with the more detailed statement in Order No. 15.

Petitioners, of course, assume the risk of their own interpretation of the statute. They cannot impute to the Commission acceptance of this interpretation when the Commission, without attempting to construe the statute in any way, has merely stated that their statutory rights would be recognized. Even without a statement by the Commission of any sort, petitioners would have been required to file cost data and the Commission would have been authorized to use such data to the extent provided by law.

II

THE QUESTION OF JURISDICTION

Throughout this litigation the Commission has sought a decision on the merits of the question of statutory construction so that it might proceed as expeditiously as possible with the fixing of minimum prices. In neither of the lower courts did it brief or argue any question of jurisdiction. Nevertheless, the decision of the Court of Appeals rests mainly on jurisdictional grounds. The Commission is willing to submit the jurisdictional questions thus raised on the basis of the arguments and authorities in that opinion. It desires only to call this Court's attention to a few additional considerations which seem pertinent.

The Bituminous Coal Act twice provides that the circuit courts of appeals shall have exclusive juris-

diction to set aside orders of the National Bituminous Coal Commission. Section 6 (b), (d). In the *Mallory Coal Co.* case, the Court of Appeals, following the decision of this Court in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, held that these provisions did not give the circuit courts of appeals jurisdiction to review procedural or preliminary rulings of the Commission, even though cast in the form of orders. This Court should be reluctant to permit this limitation of the scope of the review provisions in the Act, which narrows the jurisdiction of the circuit courts of appeals, to expand that of the district courts to review Commission decisions.[17] It clearly was not the intention of Congress that the preliminary and procedural decisions of the Commission which were not subject to review in the circuit courts of appeals should be reviewable in the district courts.

[17] In *Shields* v. *Utah Idaho Central R. Co.*, No. 28, Oct. Term, 1938, decided December 5, 1938, this Court held that final determinations of the Interstate Commerce Commission not reviewable under the Urgent Deficiencies Act might be attacked in an ordinary suit for injunction. No further administrative action was called for or possible. The case does not indicate that preliminary or procedural matters not directly assailable under statutory review provisions are to be reviewed by the regular district courts. Such review of preliminary matters would afford "opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions," and would do equal violence to the manifest purpose of the statutory provisions for judicial review. *Cf. Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–384.

The general rule that the administrative process must be completed before equity will interfere, even where damage may ensue to complainants while that process is going on (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Petroleum Exploration, Inc.*, v. *Public Service Commission*, 304 U. S. 209), affords an additional strong reason for limiting the powers of the district courts to enjoin the Commission from making preliminary rulings.

Under such circumstances, the allegations of damage to be suffered if the administrative process continues without interruption should be carefully scrutinized in order that it may be determined whether the damage to complainants is sufficient to justify disregard of the important public policies referred to above.

Examination of the complaint (Paragraph 15, R. 12–13) indicates that the only specific allegations of injury [18] are that disclosure of costs will cause consumers to *demand* lower prices, and that the high cost producers will lose business to low cost producers and have their credit standing impaired. But there is no allegation that the consumers will force producers to sell at the lower prices they demand, or that any of petitioners are high-cost producers. The injury alleged does not follow directly

[18] The general allegation (R. 12) that petitioners' "property right" in the information will be destroyed, and that there will be "great prejudice" and "irreparable injury" to petitioners are, of course, mere conclusions not admitted by the motion to dismiss.

or necessarily from the action of the Commission, but only from the anticipated conduct of other producers and consumers after the disclosure. Taking the allegations of fact to be true, as we must on respondents' motion to dismiss, it is still clear that the injury alleged is remote, speculative, and conjectural. Obviously the cost reports of all producers are to be disclosed at the same time, not merely those of petitioners. And the injury alleged will vanish when minimum prices are fixed.

The recent decision of this Court in *State of California* v. *Latimer,* No. 13, Original, demonstrates that even on a motion to dismiss general allegations of damage may not be sufficient to justify equitable relief. It can be stated equally as well here as in that case with respect to the allegations of irreparable injury that "No supporting detail or specification is given. Such a general statement is not adequate basis for relief on the ground of irreparable damages."

CONCLUSION

Although the Commission realizes that the question of jurisdiction cannot be waived (*United States* v. *Griffin,* 303 U. S. 226, 229), it still would prefer to have the case decided on the merits. If this Court should hold that the Court of Appeals erred in ruling that the District Court lacked jurisdiction, it is respectfully requested that this Court itself pass on the question of statutory construction and not remand the case to the Court of Appeals

for a determination of that question.[19] Such a remand would result in further delay and seriously hinder the Commission in the performance of its statutory duties.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ROBERT L. STERN,
HUGH B. COX,
Special Assistants to the Attorney General.
ROBERT W. KNOX,
General Counsel,
National Bituminous Coal Commission.

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[19] This Court has on other occasions passed on the merits of a case after reversing a ruling of a lower court that jurisdiction was lacking. *Dismuke* v. *United States*, 297 U. S. 167; *United States* v. *California*, 297 U. S. 175. In each of those cases, as here, the District Court took jurisdiction and decided the case on the merits and the Court of Appeals reversed for lack of jurisdiction. *Cf. Langnes* v. *Green*, 282 U. S. 531.

APPENDIX

A. Commission Order No. 15, July 15, 1937

United States
Department of the Interior
National Bituminous Coal Commission
Washington, D. C.

Order No. 15

AN ORDER REQUIRING REPORTS FROM PRODUCERS PURSUANT TO SECTION 10 (A) OF THE BITUMINOUS COAL ACT OF 1937

Pursuant to act of Congress entitled "An Act to regulate interstate commerce in bituminous coal, and for other purposes" (Public, No. 48, 75th Cong., 1st sess.), known as the Bituminous Coal Act of 1937, the National Bituminous Coal Commission, in order to perform effectively its duties under said Act, is required to be fully informed as to the production and distribution of bituminous coal throughout the United States. Therefore, pursuant to authority conferred by Section 10 of said Act, the Commission orders and directs as follows:

1. That each producer of bituminous coal, whether or not a code member and whether or not engaged in commerce in coal which is subject to the provisions of Section 4 of said Act, shall file, in duplicate, complete reports showing the total

costs of the tonnage produced and realization prices derived from the sale of coal, all as more fully set forth and specified in the Commission's Cost Forms No. 1 and No. 1–A, such reports to be made separately for each mine and to include all coal produced during the calendar year 1936 and all coal sold during the same period.

2. The Commission's Cost Form No. 1 shall be used by producers for mines having a present actual daily capacity of more than fifty (50) net tons.

The Commission's Cost Form No. 1–A shall be used by producers in making reports for mines having a present actual daily capacity of fifty (50) net tons or less.

In the case of any mine not actually in operation during the calendar year 1936, the producers shall report such data as will show all costs of ownership and maintenance.

3. The Secretary of the Commission shall cause to be mailed to each known producer within the United States a copy of this order, together with necessary forms, and shall make available to all producers additional copies of said forms at the office of the statistical bureau of the Commission in each district established under said act.

4. Each producer shall, within fifteen (15) days from the date of receipt of a copy of this order and of said forms, file the required reports, duly verified, with the statistical bureau of the Commission in the district within which the mine or mines reported upon are located.

The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under

this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

By order of the Commission.

Dated this 15th day of July 1937.

[SEAL] F. WITCHER MCCULLOUGH,
Secretary.

B. FINDINGS AND OPINION OF THE COMMISSION ON PETITION OF MALLORY COAL CO.

BEFORE THE

NATIONAL BITUMINOUS COAL COMMISSION

DOCKET NO. 13

PETITION OF MALLORY COAL COMPANY ET AL. FOR VACATION OF RULING BY THE COMMISSION DATED MARCH 30, 1938, AND REVOCATION OF ITS CONSTRUCTION THEREIN OF SECTION 10 (A) OF THE BITUMINOUS COAL ACT OF 1937

DOCKET NO. 14

ROCHESTER AND PITTSBURGH COAL COMPANY AND EXCEPTION TO RULING OF COMMISSION DATED MARCH 30, 1938

Findings of Fact and Opinion of the Commission

The above entitled proceedings were consolidated for the purpose of hearing which was held before the Commission on May 25, 1938. The petitioners herein seek to vacate a Ruling of the National Bituminous Coal Commission, dated March 30, 1938, construing Section 10 (a) of the Bituminous Coal Act of 1937 and ask that the construction therein set forth permitting the introduction in evidence at a hearing before the Commission of data with respect to 1936 costs of production obtained

from the petitioners, be revoked. This cost information was obtained to be used in connection with the proposal and establishment of minimum prices of coals of code members, and was collected pursuant to the provisions of Section 10 (a) of the Bituminous Coal Act of 1937. The Ruling of the Commission announced that the Commission would in the immediate future give public notice of a hearing to be held to determine the weighted average of the total costs of the tonnage for each minimum price area in the calendar year 1936, adjusted as provided by Section 4, Part II (a) of the Act, at which hearing the individual cost returns would be made available for introduction in evidence to afford interested parties an opportunity to check the accuracy of the determinations of the weighted average of the total costs of the ascertainable tonnage produced in the several districts, created by the Act, in the calendar year 1936.

The cost data of the individual producers was furnished to the Commission on Cost Forms Nos. 1 and 1–A, in compliance with Order No. 15 of the Commission, which order directed—

> * * * specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this order * * *.

Prominently printed on these Cost Forms in bold type was the note—

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

These Cost Forms requested information with respect to 96 items of cost and realization.

These forms were completed and filed by the petitioners pursuant to the requirements of Order No. 15 and with their understanding, based on the advice of counsel, that the Act prevented the disclosure of such cost data except in a composite form.

The petitioners contended that they would sustain irreparable damage if their cost information was to be introduced at a hearing or made available in the course of a hearing for inspection by interested parties because, in the opinion of their expert witnesses, customers with a knowledge of a producer's cost would demand low prices; that since certainty of continuous supply is a factor in the purchase of coal and since mines having a low cost of production are considered by a customer to be most likely to supply coal continuously, the producer having a low cost of production would secure much more business which would ordinarily go to the producer having a higher cost of production; that this would cause a loss of business from producer to producer and from district to district; that low cost producers would be able to under-bid high cost producers; that the credit standing of high cost producers would be impaired, rendering it difficult for them to borrow. They also testified that no protection could be afforded even if the information be published without the names of the producers, since the public could readily identify the producer by a comparison of the tonnage on the cost sheets with that published by the Bureau of Mines and other organizations. This testimony was not contraverted.

A representative of the Statistical Division of the Commission testified as to the manner in which

the cost information was collected from the producers and tabulated. In excess of 90,000 verified Cost Forms for the years 1936 and 1937 were filed by producers, both code members and non-code members, with the various Statistical Bureaus of the Commission, and these reports were coded by key numbers, which were kept confidential. The reports were checked for mathematical errors and were carefully edited to note any out-of-line or missing items. If any errors were discovered, the report was returned to the producer for correction and explanation, or the item in error was called to the attention of the producer by correspondence.

The figures on the cost reports were then transcribed to cost plates for transmission to Washington, where the plates were carefully checked and rechecked mathematically, edited and visually inspected for any discrepancies which the staff in Washington was able to detect from their knowledge and experience of production costs in all districts.

The combined totals of the weighted average costs of the individual items reported on the Cost Forms were transcribed from the tabulation plates to report forms for transmission to the District Boards in composite form to enable the District Boards to make their determinations of 1936 costs of production in their respective districts in compliance with the Act. There was introduced into the record a composite form for District No. 20 which is typical in form of the composite reports made up for all districts. The 1937 costs of production were similarly treated.

It is contended by the petitioners that the composite cost reports showing the combined totals of

the weighted average costs of the individual items reported on the Cost Forms transmitted to the District Boards in composite form constitute sufficient evidence to satisfy all of the provisions of the Act and the Due Process Clause of the Constitution. They point out that if the individual Cost Forms of the producers, being the underlying data from which the composites are compiled, are introduced in evidence, the record would be so voluminous and cumbersome that it would be impossible to ever effectively achieve the ends contemplated by the Act. This is not contraverted by any evidence in the record.

It is asserted that the transcription of the individual cost items from the Cost Forms to the cost plates, and thereafter to such composite cost reports, involves only a mathematical computation, and that the individual Cost Forms themselves would serve no useful purpose except to check these mathematical calculations made by the statisticians of the Commission. On the contrary, it appears from the testimony of the representative of the Statistical Division of the Commission that in determining whether certain of the Cost Forms should be returned to producers for correction because of out-of-line or missing items, or in determining whether to accept the cost items as reported, the exercise of judgment and the application of sound statistical practices were employed.

Without such Cost Forms being available, a party interested in the proceedings would have no way of determining whether or not sound judgment was exercised or whether statistical practices were properly applied. The right to test this judgment is doubly important in view of the fact that

the Act clearly contemplates that the verified cost data furnished by the producers should be taken as the basis in determining producers' costs because of the obvious practical impossibility of auditing the books of each of the ten thousand or more producers of coal.

The averment of the petitioners that they prepared and filed the Cost Forms pursuant to Section 4, Part II (a) of the Act, is without merit, because Order No. 15 specifically called for the information under Section 10 (a) of the Act. Under Section 4, Part II (a), the Commission could not have obtained information concerning all of the ascertainable tonnage, but only with respect to the tonnage produced by code members.

The petitioners argue that Section 10 (a) of the Act does not permit the disclosure of producers' costs of production except in proceedings involving suits between individual producers or in suits by the Commission against individual producers, and that even under such circumstances the cost data can only be disclosed by actual introduction in evidence at a hearing, not by making such cost information available for inspection in the course of a hearing. This Section provides that producers' cost data shall not be disclosed—

> * * * without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence at any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission.

By the Ruling complained of, the Commission has interpreted this Section as permitting the introduction in evidence of the cost data in *any* hearing before the Commission or any court.

When the Bill providing for the Act was before Congress the House Committee on Ways and Means (Report #294, February 23, 1937) reported that it was the intention of the Bill to permit the disclosure of these cost returns "only with the consent of the producer *or in evidence at a hearing before the Commission or court.*" It is clear that Congress so intended.

Even if it be conceded that Section 10 (a) is ambiguous and susceptible of a construction that would prohibit the introduction of such data in evidence, nevertheless it must be given the construction that would render it constitutional. Any construction of Section 10 (a) of the Act other than that adopted by the Commission in its Ruling of March 30, 1938, would deprive interested parties of a full and fair hearing in accordance with due process of law.

It is well settled that "due process", within the meaning of the Fifth Amendment of the Federal Constitution, guarantees that a party to a hearing or proceeding is entitled to be confronted with the evidence offered against him and be given an opportunity to examine, refute, or explain the same. The courts have been zealous in safeguarding these rights in an administrative hearing. All parties must be fully apprised of evidence submitted or to be considered and must be given a real opportunity to examine witnesses, inspect documents and other evidence in explanation or rebuttal, for in no other way can a party maintain his rights or his defense.

Interstate Commerce Commission v. *Louisville and Nashville Ry. Co.*, 227 U. S. 88; *Southern Pacific Co.* v. *Bartine*, 1 Fed. (2d) 323; *St. Louis Southwestern Railway Co.* v. *Interstate Commerce Commission*, 264 U. S. 64; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Although there are many thousands of Cost Forms, there can be no compromise on the grounds of convenience or expediency or because of a natural desire to be rid of harassing detail, and examination of them must be permitted. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292.

There is no requirement that underlying data or individual cost sheets be made part of the record in order to afford a full and fair hearing to parties. They must, however, be available for inspection so that interested parties may be fully apprised of the evidence submitted or to be considered. *Wigmore Treatise on Evidence* (Second Edition, Vol. 2, Sec. 1230); *St. Louis Ry.* v. *Interstate Commerce Commission*, 264 U. S. 64; *Northern Pacific Ry. Co.* v. *Keyes*, 91 Fed. 47 (C. C., N. D. 1898); *Elmer Co.* v. *Kemp*, 67 Fed. (2d) 948; *Paschen* v. *United States*, 70 Fed. (2d) 491; *Berthold-Jennings Lumber Co.* v. *St. Louis Ry. Co.*, 80 Fed. (2d) 32.

In reply to petitioners' contention that if the cost data is admissible at all, Section 10 (a) limits it to actual introduction in evidence at a hearing, the Commission holds that making available for inspection the underlying cost data to test the accuracy of composite exhibits, which are a summary of the items contained on the Cost Forms, is in

effect introducing the underlying data in evidence without unduly encumbering the record. (See cases *supra*). The *New England Divisions Case,* 261 U. S. 184, cited by petitioners, has no application here. The issue was whether or not "typical evidence" constituted competent evidence. In the determination of weighted average cost, typical evidence has no place because each item of cost must be included.

Petitions for leave to intervene in the proceeding by the Rochester and Pittsburgh Coal Company (Docket No. 14) were filed by: Imperial Coal Corporation, Heisley Coal Company, Monroe Coal Company, Ebensburg Coal Company, Allegheny River Mining Company, Ringgold Coal Company, Reid Coal Company, and the Berwind-White Coal Company. These interventions were granted for the reason that all of these producers filed cost data with the Commission as did the petitioners herein.

Petitions for leave to intervene in both Dockets Nos. 13 and 14 in support of the Commission's Ruling, dated March 30, 1938, were filed by and granted to the following municipal corporations: City of Cleveland, City of New York, and City of Chicago. The Consumers' Counsel also appeared and was permitted to be heard in these proceedings.

Petitions for leave to intervene in both Dockets Nos. 13 and 14 in support of said Ruling were filed by the following consumers of bituminous coal: Indiana Gas and Chemical Corporation, Association of American Railroads, American Shortline Railroad Association, and Associated Industries of New York State, Inc. Upon objection of

petitioners to said intervention, the Commission reserved its ruling thereon, permitting such consumers to participate in the hearing. The Commission has sustained such objections and denied the petitions of the consumers to intervene as the consumers did not show any right that might be jeopardized by disclosure of the cost data of the producers.

An appropriate order in the premises will be entered in conformity herewith.

By the National Bituminous Coal Commission.

Dated June 1, 1938.

F. WITCHER MCCULLOUGH,
Secretary.

Commissioner MALONEY, dissenting:

I cannot agree with findings of fact and opinion of the Commission upon the petition of the Mallory Coal Company et al., some of whom are intervenors, and on those findings of fact and the opinion I dissent. However, the petition of applicants should be dismissed and denied, because this kind of procedure is inappropriate for the relief they seek.

C. THE PERTINENT PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937

(50 Stat. 72–90, 15 U. S. C., § 828–851)

SEC. 2. (a) * * * No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission unless it has given reasonable public notice of a hearing and unless it has afforded to interested parties an opportunity to be heard, and unless it

has made findings of fact. Such findings, if supported by substantial evidence, shall be conclusive upon review thereof by any court of the United States.

BITUMINOUS COAL CODE

SEC. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code" and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to, as code members, and the provisions of such code shall apply only to such code members except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

* * * * *

PART II—MARKETING

The Commission shall have power to prescribe for code members minimum and maximum prices and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the

preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "minimum-price-area table," equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by

the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

MINIMUM-PRICE-AREA TABLE

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; that part of Southeastern district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12.

Area 3: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 4: Arkansas-Oklahoma, district 14.

Area 5: Southwestern, district 15.

Area 6: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 7: Wyoming, district 19; Utah, district 20.

Area 8: North Dakota and South Dakota, district 21.

Area 9: Montana, district 22.

Area 10: Washington and Alaska, district 23.

The minimum prices so proposed shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the inter-

ests of the consuming public. The procedure for proposal of minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

A schedule of such proposed minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify such proposed minimum prices to conform to the requirements of this subsection, which shall serve as the basis for the coordination provided for in the succeeding subsection (b): *Provided,* That all minimum prices proposed for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: *And provided further,* That no minimum price shall be proposed that permits dumping.

As soon as possible after its creation each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect, as accurately as possible, any change or changes which may have been established since January 1, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each

district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, propose reasonable rules and regulations incidental to the sale and distribution, by code members within the district, of coal. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, for the purpose of coordination.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the

rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon

establish and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of part II of this section.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided,* That no maximum price shall be established for any mine which shall not yield a fair return on the fair value of the property.

(d) If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section. Pending final disposition of

such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act.

* * * * *

SEC. 6. (b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the

hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(c) If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission, in its discretion, may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. * * *

(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as

the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

SEC. 8. (a) The members of the Commission are authorized to administer oaths to witnesses appearing before the Commission and to authorize the taking of depositions in any proceedings; and, for the purpose of conducting its investigations, said Commission shall have full power to issue subpenas and subpenas duces tecum, which shall be as nearly as may be in the form of subpenas issued by district courts of the United States. In case of contumacy by or refusal to obey a subpena issued to any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Upon the filing of the application for such aid with the clerk of the court, the court shall, either in term time or vacation, forthwith enter an order of record requiring such person to appear before such court at a time stated in the order, not more than ten days from the entry of the order (unless for good cause shown such time is extended), and show cause why he should not be required to obey such subpena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission and give such testimony or produce such evidence as may be lawfully required by said Commission. * * *

SEC. 10. (a) The Commission may require reports from producers and may use such other

sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission.

(b) Any officer or employee of the Commission or of any district board who shall, in violation of the provisions of subsection (a), make public any information obtained by the Commission or the district board, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $500, or by imprisonment not exceeding six months, or by both fine and imprisonment, in the discretion of the court.

(c) If any producer required by this Act or the code or regulation made thereunder to file a report shall fail to do so within the time fixed for filing the same, and such failure shall continue for fifteen days after notice of such default, the producer shall forfeit to the United States the sum of $50 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury

of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the producer has his principal office or in any district in which he shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeiture.

SEC. 17. As used in this Act—

* * * * *

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528.

UTAH FUEL COMPANY, ET AL., *Petitioners*,

v.

NATIONAL BITUMINOUS COAL COMMISSION, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., AS AMICI CURIAE.

CLARENCE A. MILLER,
Counsel for
Aberdeen and Rockfiish Railroad Company, et al.,
As Amici Curiae;
Office and Post-Office Address:
1120 Tower Building,
1405 K Street, N. W.,
Washington, D. C.

December 30, 1938.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528.

UTAH FUEL COMPANY, ET AL., *Petitioners,*

v.

NATIONAL BITUMINOUS COAL COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., AS AMICI CURIAE.

I.

PRELIMINARY STATEMENT.

The Aberdeen and Rockfish Railroad Company, and the other railroads named in Appendix A, attached hereto, for whose account this brief *amici curiae* is filed, are common carriers by railroad, and are large consumers of bituminous coal from mines subject to the Bituminous Coal Act of 1937 (50 Stat. 72, U. S. C. Title 15, §§ 828-851), hereinafter referred to as the Coal Act, and to the regulation of the Na-

tional Bituminous Coal Commission, hereinafter referred to as the Coal Commission, and, therefore, have a direct and vital economic interest in the proper interpretation and application of the Coal Act, and have a direct interest in this proceeding because of its possible ultimate effect upon the establishment of minimum prices of railroad locomotive fuel coal by the Coal Commission. They, therefore, through counsel, and with the consent of the parties to this proceeding, submit this brief for the consideration of the Court.

II.

STATEMENT OF THE CASE.

This case is before this Court on writ of certiorari to the United States Court of Appeals for the District of Columbia to review a decision of that Court of December 5, 1938, affirming the judgment of the District Court of the United States for the District of Columbia, dismissing Petitioners' bill of complaint for injunction and petition for declaratory judgment, and denying a motion for temporary injunction (R. 29). The opinion of the United States Court of Appeals for the District of Columbia is printed in full in the record at pages 23 to 28.

Petitioners urge that the United States Court of Appeals for the District of Columbia erred:

1. In holding hat the District Court was without jurisdiction to enjoin the Respondents from taking the action which they propose to take.

2. In failing to hold, on petition for rehearing, that its opinion is in conflict with the opinion of this Court, also rendered on December 5, 1938, in No. 28—*Shields* v. *The Utah Idaho Central Railroad Company* (6 U. S. Law Week 423-425).

3. In failing to hold that the action which Respondents are threatening to take is specifically prohibited by the provisions of the Bituminous Coal Act of 1937.

III.

THE ISSUES.

The issues in the case are not entirely clear. The case seems susceptible to the view that there is a single issue involved, namely: whether the action is, in essence, one to review a preliminary and procedural order of an administrative tribunal. On the other hand, it is possible to take the view that since the District Court dismissed the bill of complaint upon its merits, the case will here be reviewed upon the merits. It is also possible to view the issues as being both procedural and substantive, and it is in that light that the argument herein is presented.

IV.

SUMMARY OF ARGUMENT.

1. The bill of complaint for injunction and petition for declaratory judgment, as filed in the District Court, is essentially an action to review a preliminary, procedural order of the National Bituminous Coal Commission, and such order is not reviewable, directly or indirectly.

2. The case of *Shields* v. *The Utah Idaho Central Railroad Company* (No. 28, October Term, 1938, decided December 5, 1938) is distinguishable from the present case.

3. The remedy provided by Section 6 (b) of the Bituminous Coal Act of 1937 to persons aggrieved by its operation is exclusive.

4. The Bituminous Coal Act of 1937 should be so construed as to avoid doubts as to its constitutionality.

5. If the Bituminous Coal Act of 1937 be ambiguous, doubts should be resolved in favor of its construction by the National Bituminous Coal Commission, the administrative agency charged with its enforcement.

6. The Bituminous Coal Act of 1937 cannot be administered consonant with well established principles of constitutional law if the injunction prayed for by Petitioners is granted.

7. Congress had power to authorize the Coal Commission to make public at a hearing the individual verified cost reports of producers of bituminous coal.

8. Congress authorized the Coal Commission to disclose the individual verified cost reports of bituminous coal producers at a public hearing.

9. Petitioners have no such property rights in cost reports filed with the Coal Commission as may be protected by injunction.

V.

THE ARGUMENT.

1. The Bill of Complaint for Injunction and Petition for Declaratory Judgment, as Filed in the District Court, is Essentially an Action to Review a Preliminary, Procedural Order of the National Bituminous Coal Commission, and Such Order is Not Reviewable, Directly or Indirectly.

What Petitioners are in fact seeking to do is to prevent the Coal Commission from introducing in evidence, or making available for inspection by interested parties of record in proceedings being conducted by the Commission, the cost and sales realization data filed by them with the Commission, pursuant to and in conformity with a ruling of the Commission of March 30, 1938. The United States Court of Appeals for the District of Columbia, in *Mallory Coal Company, et al.*, v. *National Bituminous Coal Commission* (99 F. (2d) 399), held this ruling to be a preliminary or procedural order, and not subject to judicial review. The petition in the *Mallory Case* was filed pursuant to Section 6 (b) of the Coal Act, and followed the statutory review

provided for by the Act. The coal producers failing to obtain a judicial review of this preliminary or procedural order or ruling, through another group of producers, brought this proceeding in the District Court of the United States for an injunction and declaratory judgment, seeking by this method to obtain a judicial review of this preliminary or procedural ruling of the Coal Commission, which had been held in the *Mallory Case* not to be judicially reviewable. This is, therefore, a proceeding attempting to substitute an injunction suit for a statutory method of review, or, in other words, to obtain indirectly what has been denied them directly.

It is suggested to the Court that the decision of the United States Court of Appeals for the District of Columbia in the *Mallory Case* is consistent with the decisions of this Court in *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375, and *United States* v. *Illinois Central R. Co.*, 244 U. S. 82. It is also suggested that Petitioners cannot here substitute injunctive relief for the statutory appeal provided by the Coal Act. *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375, 385; *American Sumatra Tobacco Corporation* v. *Securities and Exchange Commission*, 93 F. (2d) 236, 241, 68 App. D. C. 77, 82; *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441; *Sykes* v. *Jenny Wren Co.*, 78 F. (2d) 729, 64 App. D. C. 379; *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617.

2. The case of Shields v. The Utah Idaho Central Railroad Company (No. 28, October Term, 1938, Decided December 5, 1938) is Distinguishable from the Present Case.

Petitioners urge that the decision of the United States Court of Appeals for the District of Columbia in the instant case is contrary to and inconsistent with the decision of this Court in *Shields* v. *The Utah Idaho Central Railroad Company*, decided the same day (December 5, 1938). It is

suggested that the *Shields Case* is distinguishable from the present case. The *Shields Case* arose by reason of a determination of the Interstate Commerce Commission that the Utah Idaho Central Railroad Company is not an "interurban" electric railway, and, therefore, not exempt from the provisions of the Railway Labor Act. This Court, in *Shannahan* v. *United States*, 303 U. S. 596, held such "determinations" of the Interstate Commerce Commission not to be judicially reviewable under the procedure of the Urgent Deficiencies Act. The *Shields Case* was a proceeding to restrain the United States Attorney for the District of Utah from prosecuting any proceeding for penalties based upon alleged violations of the Railway Labor Act. There is this fundamental difference between the *Shields Case* and the *Utah Fuel Case*. In the *Shields Case* there was no provision in the Railway Labor Act for a judicial review of the "determinations" of the Interstate Commerce Commission, and the procedure under the Urgent Deficiencies Act had been held not to be available for such judicial review. Therefore, unless the remedy by injunction was permitted, there could be no judicial review of any kind so far as Interstate Commerce Commission "determinations" are concerned. That, however, is not the case here. The Bituminous Coal Act of 1937, by Section 6 (b), provides a method for reviewing such orders of the Coal Commission as are generally judicially reviewable, *i.e.*, final orders. As noted above, this Court, in *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, and in other cases, has held preliminary, procedural orders of administrative agencies not to be judicially reviewable.

It is suggested, therefore, that the *Shields Case* is not a precedent for the reversal of the United States Court of Appeals for the District of Columbia in the present case.

3. The Remedy Provided by Section 6 (b) of the Bituminous Coal Act of 1937 to Persons Aggrieved by Its Operation is Exclusive.

It is apparent from an examination of the Coal Act that Congress intended to strictly limit litigation arising out of proceedings before the Coal Commission, and to minimize, so far as possible, the delays that might retard the Coal Commission in the performance of its duties, since it provided, in Section 6 (b), for a statutory review by the United States Court of Appeals for the District of Columbia, or any United States Circuit Court of Appeals, of "an order issued by the Commission in a proceeding to which such person is a party." The Congress having provided for a procedure for reviewing such orders of the Coal Commission as are judicially reviewable, the statutory remedy is exclusive. *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441; *American Sumatra Tobacco Corporation* v. *Securities and Exchange Commission*, 93 F. (2d) 236, 68 App. D. C. 77; *Sykes* v. *Jenny Wren Co.*, 78 F. (2d) 729, 64 App. D. C. 379; *Monacacy Broadcasting Co.* v. *Prall*, 90 F. (2d) 421; *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617.

4. The Bituminous Coal Act of 1937 Should be so Construed as to Avoid Doubts as to Its Constitutionality.

This Court many years ago laid down the rule that it is bound to construe a statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407. That rule has only recently been reaffirmed. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1.

5. If the Bituminous Coal Act of 1937 be Ambiguous, Doubts Should be Resolved in Favor of Its Construction by the National Bituminous Coal Commission, the Administrative Agency Charged With Its Enforcement.

Construction of a doubtful or ambiguous statute by officials charged with its administration, generally speaking, will not be judicially disturbed except for reasons of great weight. *McCaughn* v. *Hershey Chocolate Company,* 283 U. S. 488; *Spring City Foundry Company* v. *Commissioner of Internal Revenue,* 292 U. S. 182. These are but a few of the many decisions of this Court sustaining this proposition. In the determination of the issues involved in this case, therefore, any doubt with respect to the meaning of the statute, if it be held to be ambiguous, should be resolved in favor of its construction by the National Bituminous Coal Commission, the agency charged with its enforcement.

6. The Bituminous Coal Act of 1937 Cannot be Administered Consonant With Well Established Principles of Constitutional Law if the Injunction Prayed for by Petitioners is Granted.

A.—*The statutory duty of the Coal Commission.*

The preamble of the Coal Act describes its objective by a recitation of the evils sought to be overcome by it. It reads as follows:

> "That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

To effectuate the purpose of the Act, the Commission is required, by Section 4, to establish minimum prices for bituminous coal. To do this, three distinct steps are provided for. The Commission must first determine the weighted average cost of production in each of the Minimum Price Areas specified in the Act. The basis for these cost determinations are data secured by the Commission from the producers concerning costs of production, preparation, sale and distribution of bituminous coal. It is the use of these reports that is in issue here. These reports are furnished originally to the Statistical Bureaus of the Commission, in each District. From these reports the Statistical Bureaus transmit determinations of costs to the District Boards. The District Boards are required to determine the total cost of the ascertainable tonnage produced in their Districts for the calendar year 1936, with adjustments to give effect to changes since that time substantially affecting costs. The determinations of the District Boards are transmitted to the Commission, and the Commission determines the weighted average of the total costs for each Minimum Price Area. The District Boards are then required to submit proposed minimum prices and marketing rules and regulations. After these have been approved by the Commission, the prices must be coordinated in the common consuming markets, so as to meet the standards specified by the Act. If the District Boards are unable to coordinate the prices, the Commission will perform this task.

B.—*The necessity for a hearing.*

Section 2 (a) of the Coal Act provides that:

> "No order which is subject to judicial review . . ., and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact."

In addition to the statutory requirement for a hearing, there is the necessity for according the fair hearings required by the Fifth Amendment to the Constitution of the United States.

The Coal Commission is a body with power to ordain, and to issue orders that impinge upon legal rights, and is different from a tribunal, like the Tariff Commission, which has only the power to advise. Such an agency must, therefore, "pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action." *Wichita Railroad & Light Co.* v. *P. U. Comm. of Kansas,* 260 U. S. 48, 50. This hearing must be accorded before minimum prices are established. *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418.

C.—*The constitutional requirements of a fair hearing.*

Since both the Coal Act and the Fifth Amendment to the Constitution require a hearing prior to the establishment of minimum prices, it follows that such a hearing must have the elements of a "fair hearing," as defined by this Court. The statute, Section 2 (a), specifically requires public notice, and opportunity to interested parties to be heard, and findings of fact. Thus, an interested party must be allowed to introduce evidence of his own, as well as to cross-examine opposing witnesses. In *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, this Court said:

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."

The Coal Commission cannot use the cost data in its possession unless it places such data in evidence during the course of the hearings, or makes them available to interested parties for testing and refutation as basic evidence.

United States v. *Baltimore & Ohio S. W. Ry. Co.,* 266 U. S. 14.

Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88.
Wichita Railroad & Light Co. v. *Public Utilities Commission of the State of Kansas*, 260 U. S. 48.
United States v. *Abilene & Southern Ry. Co.*, 265 U. S. 274.
Morgan v. *United States*—I, 298 U. S. 468.
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38.
Morgan v. *United States*—II, 304 U. S. 23.

With this constitutional requirement there can be "no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay." *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292.

Annual reports of carriers and tariffs filed by the carriers with the Interstate Commerce Commission are public records, made so by the Interstate Commerce Act, and, therefore, open to public inspection. Yet, the Interstate Commerce Commission, under the decisions of this Court, cannot use these reports in a case unless they are made a part of the record, being introduced in evidence, according to the Rules of Practice of the Commission. Evidence introduced in Interstate Commerce Commission cases in tabular form must be supported by a witness available for cross-examination who is familiar with the underlying data upon which it is based. *American Book Co.* v. *Baltimore & Ohio R. Co.*, 179 I. C. C. 650. If the Interstate Commerce Commission cannot use public reports in the determination of its cases without their being introduced in evidence, certainly the Coal Commission cannot use secret data in the fixing of minimum prices, but must disclose the basic data upon which such prices are fixed, namely, producers' cost reports.

The situation, therefore, resolves itself into this: The Commission cannot perform the statutory duties imposed upon it unless the production cost reports of the producers are introduced in evidence at a hearing held by the Com-

mission, or are made available for inspection by interested parties.

The minimum prices of bituminous coal as originally established by the National Bituminous Coal Commission were vacated and set aside as a result of the decision of the United States Court of Appeals for the District of Columbia in *Saxton Coal Mining Company* v. *National Bituminous Coal Commission,* and allied cases, 96 F. (2d) 517, by reason of the fact that the Commission established those prices without according the hearing required by the statute and the Constitution. Throughout the hearings since initiated, and now in progress, looking to the establishment of minimum prices for bituminous coal, these railroads, as large consumers of bituminous coal, have insisted that they be accorded their constitutional and statutory rights of having the data upon which the minimum price orders will be based placed in the record, or otherwise made available to them. In other words, these railroads have throughout the proceedings insisted that the prices be fixed upon data submitted on top of the table and not under the table.

In addition to meeting and complying with the constitutional requirements, the Coal Commission has a very practical task in the establishment of minimum prices, as required by the Coal Act. The Coal Act is an attempt on the part of Congress to stabilize the bituminous coal industry, and, perhaps, goes further by way of experimentation in Government-industry relationship than any other statute. To be successfully administered, it must be so interpreted and applied as to assure not only the protection of the public but the confidence of the public, both as producers and as consumers of bituminous coal. If minimum prices are to be established on the basis of secret data, with no opportunity on the part of the public to examine and check the bases of the price structure, it can hardly serve to inspire the confidence of the public. It is, therefore, consistent with public policy that the individual verified cost reports of bituminous coal producers be made public at the hearings,

so as to enable them to be checked by interested parties of record in the proceedings. While Congress intended to protect the consumer from the establishment of unreasonably high minimum prices, at the same time it intended that the coal industry have reasonable minimum prices established for it. Under these circumstances, it can hardly be assumed that Congress intended to have secret data used, because that would be fair neither to the producer nor to the consumer, even if it were constitutionally possible.

If the injunction prayed for by the Petitioners is granted, it would seem to follow, both as a legal fact and an economic fact, that the Coal Act cannot be successfully administered by the Coal Commission.

7. Congress Had Power to Authorize the Coal Commission to Make Public at a Hearing the Individual Verified Cost Reports of Producers of Bituminous Coal.

This Court, in *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, seems to have settled the proposition that Congress had the power to authorize the Coal Commission to make public at a hearing the individual verified cost reports of the producers of bituminous coal. The Coal Commission is not merely an advisory body with no power to ordain, but is an administrative agency with power to make orders which take away the property of consumers of bituminous coal, and it must, therefore, act within the requirements of the Constitution. Since it is required to accord a hearing, it is bound to expose the details as well as the summaries. In the *Norwegian Nitrogen Company Case*, this Court, at page 317, said:

> "There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this [Tariff] Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far."

8. Congress Authorized the Coal Commission to Disclose the Individual Verified Cost Reports of Bituminous Coal Producers at a Public Hearing.

That Congress had and exercised the will "to go so far" as to make available to the business rivals of a producer and to the public generally the individual verified cost reports of bituminous coal producers, when so disclosed in evidence in any hearing before the Coal Commission or any Court, seems clear from the language of Section 10 (a) of the Coal Act, which contains this provision:

> "No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission or any Court*, and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so complied, may be published by the Commission." (Emphasis supplied)

Compare the above-quoted provision with that found in Section 10 (a) of the Bituminous Coal Act of 1935 (49 Stat. 991, U. S. C., Title 15, § 801), certain provisions of which were held unconstitutional in *Carter* v. *Carter Coal Co.*, 298 U. S. 238. In the 1935 Act the provision reads as follows:

> "No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is warranted by a controversy with the producer over any order of the Commission*, and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Emphasis supplied)

Thus it will be seen that Congress, in the re-writing of the 1935 Act into the 1937 Act, gave specific attention to this provision of the law. Under the 1935 Act disclosure of production costs was limited to cases where there was a controversy with the producer over any order of the Commission. Under the 1937 Act, however, such information may be disclosed in evidence in any hearing before the Commission or any Court. Although the reports of the Committees of Congress are silent on the subject, yet it must be taken that Congress recognized the necessity for hearings, and the necessity for the introduction of these production cost reports in evidence at such hearings, in order that the Act, and the orders issued under it, may not be constitutionally invalid. Certainly, Congress did not broaden this language with the intent that it should be meaningless.

While, under Section 4-II-(a), individual verified cost reports of producers are required to be held confidential by the *Statistical Bureaus*, the cloak of secrecy is specifically removed by Section 10 (a) of the Act so far as the *Commission* is concerned, when such disclosure is made in evidence in any hearing before the Commission or any Court. It is only by so construing the Act that either the Act or the minimum price orders of the Commission can have the basic constitutional validity.

9. Petitioners Have No Such Property Rights in Cost Reports Filed with the Coal Commission as May Be Protected by Injunction.

When Congress enacted the Coal Act, deciding that the bituminous coal industry is so affected with the public interest as to require regulation, business secrets, as distinguished from "trade secrets" ceased to exist in the bituminous coal industry, and such data as are necessary to be disclosed in order that the Coal Commission may perform its statutory duties had the cloak of secrecy removed, and in removing this secrecy the Congress did not deprive the

producers of any property rights, such as may be protected by injunction. *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294; *Norwegian Nitrogen Products Company* v. *U. S. Tariff Commission*, 6 F. (2d) 491; *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Wilson* v. *United States*, 221 U. S. 361; *American Sumatra Tobacco Corporation* v. *Securities and Exchange Commission*, 93 F. (2d) 236. See Note, 29 L. R. A. (N. S.) 716.

Even though Petitioners could show irreparable injury, and the lack of relief therefor, this Court would not be justified in depriving the Coal Commission of its means of performing the statutory duties imposed upon it by Congress. *United States ex rel Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, rehearing denied, 294 U. S. 731; *United States ex rel Kansas City Southern Ry.* v. *Interstate Commerce Commission*, 98 F. (2d) 268; *Procter & Gamble Co.* v. *Coe*, (U. S. Ct. App. D. C.) 96 F. (2d) 518.

It is elemental that injunction will lie only when it is clearly shown that irreparable injury will be done. Since the producers have no property rights in the verified production cost reports, they cannot suffer irreparable injury by the disclosure of such reports by the Coal Commission. To the extent that any coal producer is prejudiced competitively by the disclosure of the production cost reports it is a case of *damnum absque injuria*. It is a well-settled rule of law that acts of public agents within the scope of their authority, if they cause damage, cause simply *damnum absque injuria*.

VI.

CONCLUSION.

It is respectfully suggested that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

CLARENCE A. MILLER,
Counsel for
Aberdeen and Rockfiish Railroad Company, et al.,
As Amici Curiae;
Office and Post-Office Address:
1120 Tower Building,
1405 K Street, N. W.,
Washington, D. C.

December 30, 1938.

APPENDIX A.

List of Railroads for Which This Brief is Filed.

Aberdeen and Rockfish Railroad Company..North Carolina
Alabama Central Railway .....Alabama
Arcade and Attica Railroad Corporation .....New York
Arkansas Railroad Company ..... Arkansas
The Atlantic and North Carolina Railroad Company.....North Carolina
Augusta Railroad Company .....Arkansas
Bath and Hammondsport Railroad Company....New York
Belfast and Moosehead Lake Railroad Company....Maine
Bellefonte Central Railroad Company.....Pennsylvania
Bingham and Garfield Railway Company.....Utah
Birmingham Southern Railroad Company .....Alabama
Bonhomie and Hattiesburg Southern Railroad Company .....Mississippi
Buffalo, Union-Carolina Railroad .....South Carolina
Butte, Anaconda & Pacific Railway Company....Montana
Canton Railroad Company .....Maryland
Chattahoochee Valley Railway Company .....Alabama
Georgia
Chesapeake Western Railway .....Virginia
Chicago and Calumet River Railroad Company....Illinois
Chicago Short Line Railway Company .....Illinois
The Clarendon and Pittsford Railroad Company..Vermont
Collins & Glennville Railroad Company .....Georgia
The Dansville and Mount Morris Railroad Company ..... New York
DeKalb & Western Railroad Company .....Mississippi
Detroit, Caro and Sandusky Railway Company...Michigan
East Tennessee and Western North Carolina Railroad Company .....Tennessee
East Washington Railway Company .....Maryland
Flemingsburg and Northern Railroad Company..Kentucky
Flint River and Northeastern Railroad Company..Georgia
Fonda, Johnstown and Gloversville Railroad Company (J. L. Hees, Trustee) .....New York
Fort Smith, Subiaco & Rock Island Railroad Company .....Arkansas
Gainesville Midland Railway (Gordon C. Carson and W. B. Veazey, Receivers) .....Georgia
Genesee and Wyoming Railroad Company .....New York

Georgia, Ashburn, Sylvester & Camilla Railway Company ..... Georgia
The Georgia Northern Railway Company ..... Georgia
The Georgia Southwestern and Gulf Railroad Company (W. M. Legg, Receiver) ..... Georgia
Greenville and Northern Railway Company. South Carolina
High Point, Thomasville & Denton Railroad Company ..... North Carolina
Kishacoquillas Valley Railroad Company.... Pennsylvania
Lake Erie, Franklin & Clarion Railroad Company ..... Pennsylvania
Lancaster and Chester Railway Company.. South Carolina
The LaSalle and Bureau County Railroad Company ..... Illinois
Laurinburg and Southern Railroad Company ..... North Carolina
Ligonier Valley Rail Road Company ..... Pennsylvania
Louisville, New Albany & Corydon Railroad Company ..... Indiana
Manistee and Northeastern Railway Company... Michigan
Marinette, Tomahawk & Western Railroad Company ..... Wisconsin
Maryland and Pennsylvania Railroad Company.. Maryland
Pennsylvania
Midland Continental Railroad ..... North Dakota
Minneapolis, Northfield and Southern Railway ..... South Dakota
Minnesota Western Railway Company..... Delaware
Mississippi & Skuna Valley Railroad Company. Mississippi
Mississippi Export Railroad Company..... Mississippi
Montana, Wyoming & Southern Railroad Company ..... New Jersey
Morehead and North Fork Railroad Company.. New Jersey
The Narragansett Pier Railroad Company... Rhode Island
Nezperce & Idaho Railroad Company ..... Idaho
Okolona, Houston and Calhoun City Railway Company ..... Mississippi
Oneida & Western Railroad Company..... Tennessee
Pickens Railroad Company ..... South Carolina
Pittsburgh, Allegheny & McKees Rocks Railroad Company ..... Pennsylvania
The Pittsburgh & West Virginia Railway Company ..... Pennsylvania
West Virginia

Port Huron and Detroit Railroad Company.....Michigan
The Prattsburgh Railway Corporation .....New York
The Prescott & Northwestern Railroad Company.Arkansas
Pullman Railroad Company .....Illinois
Rahway Valley Company (Rahway Valley Company, Lessee) .....New Jersey
Rock Port, Langdon & Northern Railway Company .....Missouri
Savannah and Atlanta Railway (Charles E. Gay, Jr., and D. G. Fogarty, Trustees) .....Georgia
Suncook Valley Railroad .....New Hampshire
Susquehanna and New York Railroad Company .....Pennsylvania
Tennessee, Alabama and Georgia Railway .....Georgia
Tennessee & North Carolina Railway Company..Tennessee
North Carolina
Tennessee Railroad Company .....Tennessee
Virginia and Carolina Southern Railroad Company .....North Carolina
Ware Shoals Railroad Company.....South Carolina
Wichita Northwestern Railway Company (T. A. Fry, Receiver) .....Kansas

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SUPREME COURT OF THE UNITED STATES.

No. 528.—October Term, 1938.

Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al., Petitioners, *vs.* National Bituminous Coal Commission, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 30, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners are producers—engaged in the business of mining coal, and members of the "Bituminous Coal Code",—that is "producers accepting membership in the Code." The National Bituminous Coal Commission, created by Act April 26, 1937 (Ch. 127, 50 Stat. 72), purporting to proceed under section 10(a), on July 15, 1937 issued Order No. 15 which directed each producer of bituminous coal to file within fifteen days complete report showing for each mine detailed cost of tonnage produced and realization prices derived from sale, during 1936. This notice concluded—

"The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

Approved forms were distributed to producers for returns to the order. They contained the following in bold type—"This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential." Petitioners made returns upon these forms.

March 30, 1938, the Commission announced that thereafter it would give public notice of a hearing to determine the weighted average of total cost of the tonnage of coal in the calendar year 1936 adjusted, etc. Further, that upon such hearing the information obtained from individual coal producers through Order 15 would be made available for inspection and introduction in evi-

dence; that section 10(a) of the Act was construed to authorize such disclosure.

Petitioners made formal objection to the March 30 action but the Commission after consideration announced adherence and ordered—

"That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

Deeming this proposed action unauthorized and relying upon section 6(b) of the Act, one of the present petitioners with others asked review in the Court of Appeals, District of Columbia. That court held the challenged action was not reviewable by it and dismissed the petition August 1, 1938. *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 F. (2d) 399. August 31, 1938, the Commision ordered its secretary to make available for inspection to "interested parties who have filed appearances in this proceeding," petitioners' cost, etc., reports returned under Order 15.

September 7, 1938 petitioners by bill filed in the District Court, District of Columbia, sought an injunction against the threatened disclosure. This set out the foregoing facts, stated that no adequate relief could be had elsewhere, and that petitioners would sustain immediate and irreparable damage if their reports were publicized. It further averred that the Commission's proposed action was unauthorized, arbitrary, unreasonable, and in flagrant violation of the statute also the promise of privacy inferable from Order 15 and the forms used for returns thereto.

The trial court held "the bill of complaint fails to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act," and dismissed it upon motion. The Court of Appeals concluded the District Court had no jurisdiction over the controversy and upon that ground approved the dismissal. The matter is here by certiorari.

We are unable to accept the view of the Court of Appeals. The District Court correctly ruled that the bill fails to state a cause of action and for that reason properly directed the bill dismissed.

A question cognate to the one here presented was before us in *Shields* v. *Utah Idaho Central Railroad Co.*, (— U. S. —), decided December 5, 1938, the date of the Court of Appeals' decision herein. We there declared, although determination by the Interstate Commerce Commission that a railroad was not "interurban" did not constitute an "order" reviewable under the Urgent Deficiencies Act of October, 1913,[1] nevertheless, in the circumstances disclosed, it could be subjected to judicial review by bill in equity. "Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions."

Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be "determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Hart* v. *B. F. Keith Vaudeville Exchange, et al.*, 262 U. S. 271, 273; also *Binderup* v. *Pathe Exchange, Inc., et al.*, 263 U. S. 291, 305; *United States* v. *Archibald McNeil & Sons*, 267 U. S. 302, 307.

By admission, Congress could have authorized the Commission to disclose the details of reports concerning costs, etc. But petitioners insist that the Bituminous Coal Act conferred no such power; on the contrary definitely denies it.

The Act contains twenty-one sections and a schedule of districts. Section 4—"The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code', and are herein referred to as the code." "Part II—Marketing" of this declares—

"The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as

[1] 38 Stat. 208, 28 U. S. C. 41.

the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. . . ."

Section 10(a)—

"The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission."

Counsel submit an ingenious argument to show that as petitioners are code members their returns to Order 15 are not within the ambit of section 10 and must be treated as if presented under Section 4, Part II(a) and therefore confidential. Also, that the challenged action of the Board conflicts with the words, spirit and general purposes of the enactment.

We have examined the argument but cannot conclude that the reasons advanced are adequate to support the point taken.

The language of section 10(a) applies to all producers and we think allows what the Board proposes. It harmonizes rather than conflicts with the general purposes of the statute to permit action by the Board only upon full information. Obviously publication may be harmful to petitioners but as Congress had adequate power to authorize it and has used language adequate thereto we can find here no sufficient basis for an injunction.

Upon the ground and for the reasons herein stated the decree of the District Court is affirmed.

Mr. Justice BLACK, concurring.

I concur in the affirmance of the decree of the District Court. For reasons stated in the opinion of the Circuit Court of Appeals,[1] I believe that Court properly found the District Court without jurisdiction.

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1 — F. 2d —.